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OCTOBER TERM 1982

NO. 82-5868

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SUPREME COURT, U.S.

ROBERT WAYNE WILLIAMS,

Petitioner

VERSUS

ROSS C. MAGGIO, JR., Warden, and
THE ATTORNEY GENERAL FOR THE STATE OF LOUISIANA,

Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

82-5868

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QUESTIONS PRESENTED

1. Whether the narrow majority of the en banc Court of Appeals misinterpreted the standards enunciated in Witherspoon v. Illinois, 391 U.S. 510 (1968) and related decisions of this Court when it concluded that a venireperson could be excluded for cause in a capital case merely because she expresses uncertainty about recommending the death penalty in some kinds of cases or in the particular case before her?

2. Whether the narrow majority of the en banc Court of Appeals misconstrued this Court's recent decision in Zant v. Stephens, ___U.S.___(1982) and the requirements of the Eighth and Fourteenth Amendments in concluding that review by the Supreme Court of Louisiana of only one of three aggravating circumstances found by the sentencing jury was constitutionally valid?

3. Whether the Court of Appeals misinterpreted Furman v. Georgia, 408 U.S. 238 (1972), Gregg v. Georgia, 428 U.S. 153 (1976), Proffitt v. Florida, 428 U.S. 242 (1976), and Jurek v. Texas, 428 U.S. 262 (1976) in upholding the unique Louisiana procedure of conducting the comparative review of death sentences by state judicial districts, rather than on a statewide basis?

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Petitioner Robert Wayne Williams respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit (Unit A) (en banc) in this case.

CITATION TO OPINIONS BELOW:

The opinion of the en banc Court of Appeals is reported at 679 F.2d 381 (5th Cir. 1982)(Unit A)(en banc), and is attached as Appendix A. The order of the court denying rehearing is cited at 679 F.2d 381 (5th Cir. 1982)(Unit A)(en banc), and is attached as Appendix B. The original panel opinion is reported at 649 F.2d 1019, and is attached as Appendix C.

JURISDICTION:

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The opinion of the Court of Appeals was rendered on June 21, 1982. The order of the Court of Appeals denying a timely petition for rehearing was rendered on August 12, 1982. On November 1, 1982, Justice White entered an order extending

the time for filing a petition for writ of certiorari to and including December 10, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

1. This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a... trial, by an impartial jury...;

the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. This case also involves the statutes in Louisiana governing sentencing in capital cases, La. Code Crim. Pro., Articles 905-905.9, which are attached as Appendix D.

3. This case also involves Louisiana Supreme Court Rule 28 governing review of capital sentences, which is attached as Appendix E.

STATEMENT OF THE CASE:

A. Course of Proceedings.

The petitioner, Robert Wayne Williams, was charged in East Baton Rouge Parish with the first degree murder of Willie Kelly in violation of La.-R.S. 14:30. He was convicted of first degree murder on April 18, 1979 and, the following day, the jury sentenced petitioner to death.[1]

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[1]The reported opinion is in error in dating the conviction on April 19, 1979, and the death sentence on April 20, 1979. Williams v. Maggio, 679 F.2d 381, 382 (5th Cir. 1982)(Unit A)(en banc).

The Supreme Court of Louisiana affirmed the petitioner's conviction and death sentence on April 7, 1980. State v. Williams, 383 So.2d 369 (La. 1980). This Court denied a petition for writ of certiorari on January 12, 1981, Williams v. Louisiana, 449 U.S. 1103 (1981), and rehearing was denied on March 2, 1981. 450 U.S. 971.

On March 13, 1981, the state district judge scheduled petitioner's execution for March 31, 1981, and on March 20, 1981, the petitioner sought post-conviction relief in the state district court. On March 24, 1981, this application was denied without an evidentiary hearing. The Supreme Court of Louisiana denied relief without written reasons on March 26, 1981, with two justices dissenting.

Petitioner then filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Louisiana on March 26, 1981. On the following day, the district court issued a written opinion denying the petition. See Williams v. Blackburn, 649 F.2d 1019, 1021-1026 (5th Cir. 1981) (Unit A)(Appendix C). The district court judgment was affirmed on June 18, 1981 by a panel of the United States Court of Appeals for the Fifth Circuit. Williams v. Blackburn, 649 F.2d 1019 (5th Cir. 1981)(Unit A). On November 3, 1981, an order was entered directing that the appeal be reheard en banc. Williams v. Blackburn, 661 F.2d 1020 (5th Cir. 1981)(Unit A).

In a 6-5 opinion, the en banc Court of Appeals affirmed the judgment of the district court on June 21, 1982. Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982)(Unit A)(en banc)(Appendix A). On August 12, 1982, the petitioner's application for rehearing was denied. (Appendix B.)

B. Facts Material to Questions Presented.

During the voir dire at petitioner's trial, the following colloquy occurred between the trial judge and venire member Martha Brou:

THE COURT:

Do either of you know of any reason why you feel that you should not or could not serve on this jury?

MS. BROU:

Well, I'm wondering about the question of capital punishment. Does that disqualify you if you don't have a firm conviction about that?

THE COURT:

I'm sure that the attorney for the State will ask you that question so I will defer that until later. All right.

T.T. I 183 (emphasis supplied).

Thereafter, the state commenced its voir dire examination of venire member Brou. The relevant excerpts of the questioning of Ms. Brou are set forth below:

Q. The State is entitled to have a juror that can say, yes, I can return a verdict requiring the death penalty, if the case is proven to me and if the aggravating circumstances are proven to me. So if you don't know at this point and you are not able to tell me, then that doesn't really help me. Because I don't know what your decision will be down the road. So my question is also framed in this manner. Assuming that I prove the defendant committed first degree murder and is convicted, assume I prove the statutory requirements of aggravating circumstances, which under Louisiana law make the case appropriate for the death penalty, can you return a verdict that mandates that the defendant be put to death by electrocution?

A. I don't think I could do that.

Q. Okay. I appreciate your being honest with me. And let me ask you this. When you say I don't think I can, what you are telling me, you can't tell me positively that you can; is that correct?

A. I know there is certain cases where you read about them and they are so hideous that you just think, oh, the death penalty would be the only good outcome, but this particular case, I don't know.

Q. As the Judge told you, this is the killing of a -- Well, I don't know if the Judge said all that, but I think it is before the jury. This is the

A & P robbery, murder that occurred on January the 5th of this year. And it is my understanding that you feel that you could not return the death penalty.

A. Oh, let's see. I'm afraid I couldn't. I would just be thinking in terms of why can't a person like that be rehabilitated rather than exterminated.

Q. So you feel that you could not return the death penalty?

A. No.

Q. Are there any circumstances which you could return a verdict that would require a defendant to be electrocuted?

A. This particular one or just in general?

Q. This particular one.

A. Any circumstances where I could do that?

Q. Yes.

A. Well, of course, I don't know that much about the case. I always think in terms of how hideous the crime is because I don't know that much about it. I don't know. I don't think I can do it.

T.T. I 185-186.

The district attorney then moved to strike Ms. Brou for cause; the trial judge sustained the challenge and excluded her.

As set forth in the opinion of the Supreme Court of Louisiana on direct appeal, State v. Williams, 383 So.2d 369, 371 (La. 1980)(Appendix F), the following evidence was presented at trial. Petitioner, Robert Wayne Williams, participated with another individual (Holmes) in the robbery of a supermarket in Baton Rouge, Louisiana, on January 5, 1979. Upon entering the store, the petitioner and Holmes, both of whom were masked and armed, approached the market's security guard. As Holmes attempted to remove the security guard's pistol from his holster, the guard "made a move with his hand toward his

pistol." Id. at 371.[2] The petitioner, who was armed with a shot gun, yelled "Don't try it", and the shotgun discharged, killing the guard instantly. T.T.-II 42, 72.[3] A short time later, the petitioner "accidentally shot two people in their feet." State v. Williams, supra, 383 So.2d at 371.

The petitioner, a black male, was 27 years old at the time of the offense. His prior criminal record consisted of two previous misdemeanor convictions and no felony convictions. There was evidence that the petitioner was using drugs heavily around the time of the robbery. Id. at 374.

As mentioned above, the petitioner was found guilty of a first degree murder and the jury recommended the death sentence, finding three statutory aggravating circumstances: (1) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery; (2) the offender knowingly created a risk of death or great bodily harm to more than one person; and (3) the offense was committed in an especially heinous, atrocious or cruel manner.

On appeal, after reviewing the propriety of the first aggravating circumstance, the Supreme Court of Louisiana concluded that further appellate review was unnecessary, since the jury had the authority under Louisiana Code of Criminal Procedure

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[2] In contrast to the state court's findings, the en banc majority states that when Holmes attempted to remove the guard's pistol, "[h]e had some difficulty doing this, so Kelly [the guard] made a move toward the pistol in an effort to free it and thereby aid Holmes." Williams v. Maggio, supra, 679 F.2d at 383. Neither the state court opinion nor the trial record supports a finding that the guard reached for his pistol to "aid" in its removal, and the Court of Appeals' opinion does not indicate why the presumption of correctness accorded state court findings, 28 U.S.C. §2254(d), was not followed in the case at bar. Sumner v. Mata, ___ U.S. ___ (1982); Sumner v. Mata, 449 U.S. 539 (1981).

[3] References to the two volumes of the trial transcript in the state court will be denominated as "T.T." followed by the volume and page number.

Art. 905.3 to impose a death sentence after it found "at least one statutory aggravating circumstance." Accordingly, the state court observed that "further inquiry as to whether [the] other aggravating circumstances were properly found to exist is merely cumulative and unnecessary to support the jury's verdict." State v. Williams, supra, 383 So.2d at 374.

The state supreme court also compared the sentence imposed upon petitioner with the sentences imposed in other first degree murder cases in the same judicial district, id. at 375, and concluded that "the sentence imposed here is not disproportionate to that imposed in other similar cases." Id.

C. How the Federal Questions were Raised and Decided Below.

1. In ground one of his petition for writ of habeas corpus, the petitioner alleged that three prospective jurors were erroneously excused for cause in violation of the requirements in Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, 448 U.S. 38 (1980). The district court concluded that "[a] careful review of pages 83, 84, 185 and 186 of the trial transcript which sets [sic] forth the voir dire examination of the three jurors in question clearly shows that the mandates set forth by the United States Supreme Court...were strictly adhered to and followed by the trial court." Williams v. Blackburn, supra, 649 F.2d at 1023 (Appendix C). The panel of the Court of Appeals found "the reasons given in the court's opinion to be adequate and correct." Id. at 1021.

In a 6-5 decision, the en banc majority concluded the venire member Brou was properly excluded.[4] The Court of Appeals held that her exclusion was proper because "Ms. Brou's responses demonstrate that she would be unwilling to consider the death

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[4]Judge Randall wrote a dissent on behalf of four judges, Williams v. Maggio, supra, 679 F.2d at 396, and Judge Reavley joined in this portion of the dissent. Id. at 410.

penalty where the crime charged was murder committed during a robbery. She does leave open the possibility that she would consider this penalty in a more 'hideous' case. Her unwillingness to do so here, however, is firm." Williams v. Maggio, supra, 679 F.2d at 386 (Appendix A).

2. In grounds three to six of his petition for writ of habeas corpus, the petitioner alleged (a) that the Supreme Court of Louisiana violated petitioner's constitutional rights under the Eighth and Fourteenth Amendments by reviewing the evidentiary sufficiency of only one of three aggravating circumstances found by the sentencing jury, and (b) that the remaining two aggravating circumstances were invalid under Godfrey v. Georgia, 446 U.S. 420 (1980) and Jackson v. Virginia, 443 U.S. 307 (1979). The district court first noted its agreement with the Supreme Court of Louisiana "that it was only necessary for that court to review only one of the three mitigating [sic] circumstances which the jury found since it is only necessary for the jury to find one aggravating circumstance to support the death penalty." Williams v. Blackburn, supra, 674 F.2d at 1025. The district court also reviewed the evidentiary sufficiency of the remaining aggravating circumstances and determined that

> all three aggravating circumstances found by the jury are fully, totally and adequately supported by the evidence presented at the trial....In other words, the Court finds that the state has proven beyond a reasonable doubt the evidence to support the three aggravating circumstances which the jury found in this case.
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> Id.

The panel affirmed, simply stating that "[w]e find the reasons given in the court's opinion to be adequate and correct." Id. at 1021.

The six member en banc majority concluded that "[t]he two challenged aggravating circumstance in this case do not

suffer constitutional defects." Williams v. Maggio, supra, 679 F.2d at 688. The majority indicated that the Supreme Court of Louisiana only had to review one of the three aggravating circumstances, since that was sufficient to authorize the jury to return a death verdict. As the majority reasoned:

> The aggravating circumstances which were not considered and limited by the appellate court do not serve as the basis for the death sentence. We base the sentence on the one circumstance considered by the Supreme Court of Louisiana.
>
> Id. at 390.

3. Petitioner alleged in ground eight of his petition for writ of habeas corpus that the procedure adopted by the Supreme Court of Louisiana for the comparative review of death sentences violates the Eighth Amendment, since the court only compared the sentence in this case with the sentences in other first degree murder cases in the district in which the sentence was imposed, rather than on a state-wide basis. The district court did not address this claim, and the panel stated that "we have heard nothing which would even hint at unconstitutionality, and wholly reject the argument." Williams v. Blackburn, supra, 649 F.2d at 1021. The en banc court concluded that the review procedure adopted by the Supreme Court of Louisiana "provides adequate safeguards against the freakish imposition of capital punishment." Williams v. Maggio, supra, 679 F.2d at 395.

D. The Basis of Jurisdiction in the Federal District Court was 28 U.S.C. §2254. See also, 28 U.S.C. §2241.

REASONS FOR GRANTING THE WRIT:

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION OF THE EN BANC MAJORITY IS IN DIRECT CONFLICT WITH THE LANGUAGE AND PURPOSE OF THIS COURT'S DECISIONS IN WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968) AND ITS PROGENY.

In upholding the excusal of Ms. Brou for cause, six members of the en banc Court of Appeals concluded that her exclusion was proper under Witherspoon and its progeny.[5] Williams v. Maggio, supra, 679 F.2d at 385-386. The en banc majority reasoned:

> Witherspoon and its progeny do not mandate that a prospective juror aver that she would refuse to consider the death penalty in every case that could possible [sic] arise. If she knows enough about the case to know that she could not consider imposition of the death penalty regardless of what evidence might be presented, she must be excused. Ms. Brou's responses demonstrate that she would be unwilling to consider the death penalty where the crime charged was murder committed during a robbery. She does leave open the possibility that she would consider this penalty in a more "hideous" case. Her unwillingness to do so here, however, is firm.
>
> Id. at 385-386.

The five dissenting judges concluded that Witherspoon does not permit exclusion of a juror who states that "there were some cases where the death penalty should be returned and some where it should be refused," id. at 398 (emphasis in original), nor does it allow exclusion when a prospective juror cannot say in advance of trial whether he in fact would vote for the death penalty in the particular case before him. Id. Therefore, the dissenting judges considered that "the majority's conclusion that the exclusion of Ms. Brou was proper cannot

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[5]Although defense counsel did not object to the exclusion of Ms. Brou, there is no suggestion by the majority or dissent that the petitioner's claim is barred under Wainwright v. Sykes, 433 U.S. 72 (1977). To the contrary, as the dissent makes clear, the state elected in this case not to assert a Wainwright bar. Williams v. Maggio, supra, 679 F.2d at 396, n. 1. This

(Footnote cont'd on next page.)

be justified under Witherspoon." Id. at 399.

Certiorari is appropriate because the en banc majority's conclusion that a venire member can be excluded because of her views on the particular case before her eviscerates the Witherspoon standards by a process of reasoning that ignores the pertinent dictates of this Court. The Fifth Circuit, which encompasses several states in which large numbers of capital prosecutions occur, has therefore developed principles for jury exclusion that differ dramatically from those established by this Court. And it has done so in a manner that conflicts with every state court that has applied Witherspoon in these circumstances. Certiorari is therefore essential to ensure that this Court's pronouncements are applied uniformly and consistently throughout the country in the capital jury selection process.

A. Certiorari should be granted because the en banc majority misconstrued this Court's decisions in Witherspoon and related cases. Thus, the en banc majority created a novel and insupportable basis for exclusion of a juror in a capital case. In Witherspoon v. Illinois, 391 U.S. 510, 522-523 (1968), this Court held that a death sentence could not be carried out if the jury that imposed or recommended it was chosen by excluding venirepersons for cause simply because they voiced general objections to the death penalty or expressed conscientious scruples against it. Witherspoon provides that a venireperson

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[5](Footnote cont'd from preceding page.)

Court has likewise recognized that a state's failure to interpose a Wainwright bar precludes the assertion of a waiver argument. See Smith v. Estelle, 451 U.S. 454, 468, n. 12 (1981), agreeing with the Court of Appeals reasoning in Smith v. Estelle, 602 F.2d 694, 708, n. 19 (5th Cir. 1979) that, inter alia, the state waived its Wainwright argument by failing to raise it in federal court at anytime prior to its motion for new trial.

can be struck for cause only when the individual is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." Witherspoon v. Illinois, 391 U.S. 510, 522, n. 21.[6]

Witherspoon further establishes that venire members "cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment," and that a "prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him." Witherspoon v. Illinois, 391 U.S. at 522, n. 21.[7]

In sum, Witherspoon and related cases only allow exclusion of venirepersons who make it

> unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.
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> Id. at 522-523, n. 21 (emphasis in original).

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[6]This limited basis for exclusion was explicitly reaffirmed in Boulden v. Holman, 394 U.S. 478, 483 (1969), Maxwell v. Bishop, 398 U.S. 262, 265-266 (1970), Davis v. Georgia, 429 U.S. 122, 123 (1976), and Adams v. Texas, 448 U.S. 38, 51 (1980)(valid exclusion under Witherspoon requires that the venire member is "so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid scheme.").

[7]This point was reaffirmed in the per curiam reversal of June 28, 1971, where this Court reversed 23 cases "insofar as they impose the death sentence," citing Witherspoon and its progeny. The invalid lower court determinations reveal some of the practices deemed impermissible under Witherspoon. In at least one case, Jaggers v. Commonwealth, 439 S.W.2d 580, 585 (Ky.Ct.App. 1968), rev'd in Jaggers v. Kentucky, 403 U.S. 946 (1971), the members of the venire were erroneously excluded because they would not impose the death penalty "in this case."

See also, Adams v. Texas, supra, 448 U.S. at 44.[8]

The en banc majority's analysis is fundamentally at odds with these requirements. It is evident from the majority's decision that it lost sight of the central concern in Witherspoon: the voir dire must make it "unmistakably clear" that a prospective juror would automatically vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings. Witherspoon v. Illnois, supra, 391 U.S. at 522, n. 21. Even a cursory review of Brou's responses reveals that she did not meet this standard. First, neither the questions of the district attorney nor the answers of Ms. Brou ever grappled with whether she was automatically and irrevocably opposed to the death penalty. Instead, the colloquy initially focused on her ability to return a death penalty in some kinds of cases (murder committed during a robbery). Ms. Brou's response that there were some cases where the death penalty should be returned and some where it should be refused[9] "is the very embodiment of the veniremen

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[8]Strict compliance with Witherspoon is so basic to the right to an impartial jury in a capital case that a death sentence cannot be carried out if even a single venire member is improperly excluded. Davis v. Georgia, supra, 429 U.S. at 123. This rule is particularly compelling in light of the requirement of unanimity before a death sentence can be imposed in Louisiana, La. C.Cr.P. Art. 905.6 (Appendix D), for, as the Fifth Circuit once noted, in terms equally applicable to the case at bar:

> Where, as here, unanimity of decision is required to impose the death sentence, the stark reality is that one improperly excluded juror may mean the difference between life or death for a defendant.
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> Marion v. Beto, 434 F.2d 29, 32 (5th Cir. 1970), cert. den., 402 U.S. 906 (1971).

[9] I know there is certain cases where you read about them and they are so hideous that you just think, oh, the death penalty would be the only good outcome, but this particular case, I don't know.

T.T. I 185-186.

referred to in Witherspoon who cannot be excluded because she distinguishes between the type of cases in which she could recommend the death penalty from those in which she could not." Williams v. Maggio, supra, 679 F.2d at 398 (Randall, dissenting).[10]

Then the district attorney inquired as to whether there were any circumstances in which she could return a death verdict in the particular case before her, to which she replied:

> Well, of course, I don't know that much about the case. I always think in terms of how hideous the crime is because I don't know that much about it. I don't know. I don't think I can do it.
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> T.T. I 186.

An exclusion predicated on such a commitment also "flies in the face of the teachings of Witherspoon." Id. at 398.

Second, even if these inquiries were proper, Ms. Brou never made it "unmistakably clear" that she could never return a death sentence in an armed robbery case. Her responses are certainly not the equivalent of an automatic rejection of the death penalty regardless of the evidence nor do they reflect, as the en banc majority suggests, that "she could not consider imposition of the death penalty regardless of what evidence might be presented." Id. at 386. To the contrary, Ms. Brou's

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[10] As Judge Randall points out in dissent, this principle is particularly compelled by Louisiana's post-1976 capital sentencing scheme:

> Specifically, if it is the case that Ms. Brou would refuse to recommend capital punishment where the only aggravating circumstance was the coexistence of a murder and a robbery, the fact *that she would* refuse to recommend the death penalty in one class of cases where the State would permit her to recommend it is not grounds for her exclusion as a juror. This conclusion seems to me to be mandated by the fact that in Louisiana, the statutory scheme permits a juror to refuse to recommend the death penalty even if all jurors have found the existence beyond a reasonable doubt of one or more aggravating circumstances which outweigh any mitigating circumstances.
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> Id. at 398, n. 2.

statements indicate that she would necessarily be compelled to consider the particular circumstances of the petitioner's case to determine whether his case warranted the death penalty. Thus, her responses, far from describing an automatic and unequivocal opposition to the death penalty, actually reflect the responsibilities she would assume as a juror in a capital case. Williams v. Maggio, supra, 679 F.2d at 399 (Randall, dissenting).

Indeed, the voir dire reveals nothing more than that Ms. Brou's decision regarding the death penalty would be affected by the fact that petitioner's case involves an armed robbery murder; however, as this Court recently made clear, "neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." Adams v. Texas, supra, 448 at 50.[11]

In short, certiorari should be granted because the en banc majority's analysis and reasoning is in direct conflict with the standards enunciated in Witherspoon and related cases of this Court.[12]

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11 Nor in our view would the Constitution permit the exclusion of jurors...who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt.

Id.

12 The majority's method of analysis also conflicts with prior precedent in the Fifth Circuit. Granviel v. Estelle, 655 F.2d 673, 678-680 (5th Cir. 1981), cert. den., ___ U.S. ___ (1982); Burns v. Estelle, 626 F.2d 396, 397-398 (5th Cir. 1980)(en banc). The majority's efforts to reconcile the result in the case at bar with these decisions cannot withstand analysis, Williams v. Maggio, supra, 679 F.2d at 386, n. 2, and illustrate the sharp departure in this case from the well-settled application of Witherspoon in the Fifth Circuit.

B. Certiorari is also appropriate because the en banc majority's decision is inconsistent with the very purpose of the Witherspoon standards. This Court has provided a quick and efficient method for qualifying a juror under Witherspoon. The en banc majority's decision, however, will convert this into a lengthy and cumbersome process that serves neither the interests of the defendant or the state.

First, the Fifth Circuit has substituted a slippery slope for the clear and precise boundaries established by Witherspoon. If prospective jurors can be questioned about the facts of the particular case and excluded because they are unwilling to impose the death penalty on the basis of the facts presented during voir dire, then there are really no more definable limits on the scope of permissible voir dire inquiry under Witherspoon. As a consequence, both the prosecutor and defense counsel will seek to explore the particular facts of each case in as much detail as possible. To determine the person's views on the particular case, prosecutors would seek to focus the venirepersons on all of the aggravating and mitigating circumstances in the case. Only those jurors who could commit themselves in advance to a willingness to impose the death penalty in the particular case would not be excluded under the en banc majority's rationale. Those who do not find the aggravating circumstances as warranting the death penalty, or who find the mitigating circumstances compelling, and who therefore wouldn't impose the death penalty in light of all the aggravating and mitigating factors in the case, could be excluded for cause. Consequently, the prosecutor will have an opportunity *during voir dire* to pre-select a jury that, in contravention of Witherspoon, is "uncommonly willing to condemn a man to die." Witherspoon v. Illinois, supra, 391 U.S. at 521. This will be particularly true in the numerous

jurisdictions in this country where the jury is expressly required to consider aggravating and mitigating circumstances during the sentencing proceedings.

To counter this, defense counsel would have to respond by also presenting details of the case to the jury during voir dire. However, defense counsel's goal will be to ensure that members of the venire would still be willing to impose the death penalty even in the particular case. This would unduly prolong the voir dire and convert it into a cumbersome mini-trial in which the prosecutor and defense counsel explore in detail the relevant death penalty facts of the case prior to trial.

A second significant effect of the en banc majority's reasoning is that it appears to permit prosecutors to exclude jurors on the basis of their views of the mitigating circumstances in the case.[13] If the state is able to exclude those jurors who indicate during voir dire that they could not impose the death penalty because of their views on the mitigating circumstances in the particular case, then the prosecutor could exclude for cause all those individuals who would consider that the mitigating circumstances outweigh the aggravating circumstances. This process would eliminate from the jury those persons who would accord significance to the principal aspects of a constitutional capital sentencing hearing -- the "relevant facets of the character and record of the individual offender or the circumstances of the particular offense," Woodson v. North Carolina, 428 U.S. 280, 304 (1976) -- in favor of a venire that was already predisposed

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[13] This is not far from the situation presented in petitioner's case. Whereas Brou might have considered the nature of the particular facts and circumstances surrounding an armed robbery murder as relevant to whether she could impose the death penalty, in another case a venireperson might be unwilling to impose the death penalty because of the age of the defendant or some other statutory or non-statutory mitigating circumstance. Indeed, the rationale of the majority could be used to exclude jurors because of their views on the aggravating circumstances as well. This also is particularly inappropriate in light of Louisiana's capital sentencing scheme. See note 10. These factors serve to guide the jury's deliberations; the en banc majority's decision would improperly allow prosecutors to use them as screening devices during voir dire to exclude jurors whose ultimate decision might be affected by the presence or absence of a particular factor.

before the trial towards a death sentence, even in the face of the mitigating circumstances. The effect of this voir dire process will be to eliminate that portion of the community that will give controlling weight to the mitigating circumstances in a particular case or that feel, like venireperson Brou, that in a certain class of cases (e.g., murders committed during an armed robbery)the decision regarding the death penalty would depend on an evaluation of the circumstances of the case.Witherspoon requires that the life or death decision be made on "scales that are not deliberately tipped towards death," Witherspoon v. Illinois, supra, 391 U.S. at 521-522, n. 20; exclusions based on a particular case inquiry will invariably tip the scales towards the death penalty prior to the trial.

The en banc majority's decision, if allowed to stand, will effectively undermine the very purposes for the formulation of the Witherspoon standards in the first instance.

C. Certiorari is also appropriate because the en banc majority's ruling conflicts with the decisions of every state court that has applied Witherspoon to the exclusion of a venireperson because of the individual's views on the particular case before him. For example, in Lewis v. State, 268 S.E.2d 915, 918 (Ga. 1980), several venire members were excluded after stating that they could not impose the death penalty on the 16 year old defendant. Citing several passages from Witherspoon v. Illinois, supra, 391 U.S. at 522, n. 21, the Georgia Supreme Court vacated the death sentence, stating

> Age (youth) is a mitigating circumstance. Yet here the state was permitted to strike for cause those veniremen who would have given utmost consideration to the mitigating factor of the age of the appellant.
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> Id. at 919.

Similarly, the Supreme Court of Indiana in Monserrate v. State, 271 N.E.2d 420, 423 (Ind. 1971) held that a

venire member was improperly excluded under Witherspoon where he would be influenced in considering the death penalty by the fact that one of the defendants was 16 years old.

Furthermore, in State v. Holland, 283 A.2d 897, 902 (N.J. 1971), the Supreme Court of New Jersey, citing Witherspoon, indicated that it was constitutional error to exclude six venirepersons who stated that they would return the death penalty but not against one who, while participating in a felony murder, did not do the actual killing.

Finally, in People v. Velasquez, 606 P.2d 341, 347-350 (Cal. 1980), vacated and remanded, 448 U.S. 903 (1980), on remand, 622 P.2d 952 (1981), the Supreme Court of California held that Witherspoon precluded the exclusion of a venire member who would vote against the death penalty unless the crime was really heinous. The court reasoned that the answer "is plainly not the equivalent of an automatic rejection of the death penalty regardless of the evidence; to the contrary, [the venireperson] would necessarily be compelled to consider the evidence to determine whether the case before her was of a heinous nature." Id. at 349. Since the California statute, like those of most other states, reserved the death penalty for certain forms of aggravated murder, the juror's response "actually described the duty she would assume as a juror in a capital case." Id.

In contrast to those state cases, the en banc majority's approach to Witherspoon would improperly exclude venire members simply because they cannot commit themselves in advance of trial to a decision on the aggravating or mitigating circumstances in the particular case.

D. In sum, the resolution of the question presented by this case is vitally important for the administration of justice in this country, since it concerns the method of jury selection in a capital trial. The 6-5 disagreement of the

Court of Appeals regarding whether petitioner's death sentence is constitutionally valid under Witherspoon and related cases attests to the need for a clear statement from this Court on the issue. The propriety of exclusions under Witherspoon is uniquely unsuited to varying interpretations in the Fifth Circuit and the rest of the country. Furthermore, the changes in the voir dire process flowing from the en banc majority's decision are entirely inappropriate under most contemporary capital sentencing schemes, for the decision will transform the simple and precise process established by Witherspoon into a murky and cumbersome proceeding. The need for the preservation of a consistent and uniform approach to exclusions under Witherspoon, one that maintains the standards and purposes of that decision, makes the present case particularly appropriate for the exercise of certiorari jurisdiction.

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE REVIEW BY THE SUPREME COURT OF LOUISIANA OF ONLY ONE OF MULTIPLE AGGRAVATING CIRCUMSTANCES FOUND BY THE SENTENCING JURY VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The question raised here is related to that pending before the Court in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), cert. granted, ___ U.S. ___, certifying a question of state law to the Supreme Court of Georgia, Zant v. Stephens, ___ U.S. ___ (1982) and Barclay v. Florida, No. 81-6908, cert. granted, ___ U.S. ___ (November 8, 1982). In Zant, this Court has been asked to decide "whether a reviewing court constitutionally may sustain a death sentence as long as at least one of a plurality of statutory aggravating circumstances found by the jury is valid and supported by the evidence." Slip Op., p. 4. In the present case, the six member en banc majority concluded, over the dissent of five judges, that the Zant decision in this Court "is simply inapposite" to the issue of whether a reviewing court constitutionally may refuse to review the evidentiary sufficiency and constitutional

adequacy of two of three aggravating circumstances found by the sentencing jury at petitioner's trial. Williams v. Maggio, supra, 679 F.2d at 390.

As will be discussed below, certiorari is appropriate to review the en banc majority's decision for two independent reasons. First, the en banc majority's approach to the constitutional question raised by the petitioner is directly counter to this Court's approach in Zant v. Stephens, supra. Second, the en banc majority has resolved the underlying question in a manner that conflicts with this Court's interpretation of basic requirements of the Eighth and Fourteenth Amendments. Furthermore, contrary to the en banc majority's assertion, the resolution of this issue is inextricably intertwined with the question presented by Zant, and should be considered at the same time.

A. Certiorari is appropriate because the en banc majority's decision conflicts with the approach dictated by Zant. In Zant v. Stephens, supra, this Court explained that the state law premises were uncertain for the Georgia Supreme Court's rule that it could sustain a death sentence as long as at least one of a plurality of aggravating circumstances found by the jury is valid and supported by the evidence. Id., 102 S.Ct. 1856, 1858. The Court recognized that articulation of the reasons for this conclusion would be relevant to an analysis of the constitutionality of the state's rule. Id., 102 S.Ct. at 1859.

Rather than following this approach to the analysis of an important constitutional issue, the en banc majority "supplied a number of what must be classified as state law premises for the Louisiana rule, without benefit of a single citation to Louisiana law." Williams v. Maggio, supra, 679 So.2d at 405 (Randall, dissenting).[14] This is fundamentally at odds

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[14] In the process of losing sight of its responsibilities with respect to questions of state law, the en banc majority

(Footnote cont'd on next page.)

with Zant, for as the dissent explains, the Supreme Court of Louisiana "has adopted the same rule as the Georgia Supreme Court," but has provided "no more guidance as to the state law premises for that rule than the Georgia Supreme Court has provided." Id.[15]

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[14] (Footnote cont'd from preceding page.)

also opined, again without citation to state law, on the validity of one of the unreviewed aggravating circumstances. Id. at 389, n. 7. Of course, a proper approach to this case would necessitate consideration of the unreviewed aggravating circumstances, in light of pertinent state and federal law, by the Supreme Court of Louisiana in the first instance. Therefore, the en banc majority ventured prematurely and unnecessarily into areas properly reserved for the state court.

[15] In fact, the Supreme Court of Louisiana has been less consistent in its application of appellate review rules than the Georgia Supreme Court. In cases where there were multiple aggravating circumstances, the court initially took the position that it was not necessary to review more than one valid aggravating circumstance. State v. Williams, 383 So.2d 369 (La. 1980), cert. den., 449 U.S. 1103 (1981); State v. Martin, 376 So.2d 300, 312 (La. 1979), cert. den., 449 U.S. 1119 (1980). Then in a series of three cases, the state court reviewed all the aggravating circumstances found by the jury without explaining why it was departing from its prior decisions. State v. Berry, 391 So.2d 406, 416-417 (La. 1980), cert. den., 451 U.S. 1010 (1981); State v. Baldwin, 388 So.2d 664, 677 (La. 1980), cert. den., 445 U.S. 1103 (1981); State v. Clark, 387 So.2d 1124, 1134-1135 (La. 1980), cert. den., 449 U.S. 1103 (1981) The death sentences were upheld when the state court determined that all the aggravating circumstances were valid.

In the next two cases, the state court again reviewed all of the aggravating circumstances. State v. Monroe, 397 So.2d 1258 (La. 1981), cert. pending; State v. Sonnier, 402 So.2d 650 (La. 1981), cert. pending. However, even though the court determined that one of multiple aggravating circumstances was invalid, it sustained the death sentences, expressly relying on Georgia authority. State v. Monroe, supra, 397 So.2d at 1276. More recently, the state court has vacillated between merely reviewing one of multiple aggravating circumstances, State v. Mattheson, 407 So.2d 1150, 1168 (La. 1982), cert. pending, and review of all the aggravating circumstances found by the jury. State v. Moore, 414 So.2d 340, 348 (La. 1982), cert. pending; State v. Sawyer, 81-KA-1566, ___ So.2d ___ (La. 1982)(Slip Op., pp. 10-13).

Certiorari should be granted because the en banc majority ignored the well-charted course described in Zant for determining the state law premises of a state supreme court rule. The Court of Appeals should be directed, under the complusion of Zant v. Stephens, supra, to certify to the Louisiana Supreme Court the same question as this Court certified to the Georgia Supreme Court.

B. Certiorari is also necessary to consider the significant and important question of whether the Louisiana Supreme Court has provided the constitutionally required review of a death sentence when it reviews only one-third of the relevant findings supporting the jury's death verdict. Since the Louisiana Supreme Court professes to justify this truncated review on the ground that the jury is authorized to return a death sentence after it finds a single aggravating circumstance, La. Code Crim. Pro. Art. 905.3, State v. Sawyer, supra, Slip Op., p. 12, the constitutional validity of this practice is closely linked to a resolution of the issue in Zant v. Stephens, supra, 102 S.Ct. at 1857.

Yet, the en banc majority undertook to resolve the important question pending before this Court in Zant. It did so in a manner that ignores prior decisions of this Court under the Eighth and Fourteenth Amendments as they apply to the Louisiana capital sentencing scheme. The sharp departure in a capital case from the analysis and reasoning of this Court's prior decisions, in a Circuit where death sentences are frequently imposed, provides a significant and important reason for a grant of certiorari in this case.

The en banc majority strayed off course in this case because of two legal assumptions that run directly counter to this Court's prior decisions. First, the en banc majority states that the two unreviewed aggravating circumstances "do

not suffer constitutional defects," id. at 388, and justifies this decision on the ground that "[w]e do not confront a facially unconstitutional aggravating circumstance." Id., at 390. However, the petitioner specifically challenged the state court's constructions of these aggravating circumstances under the Eighth and Fourteenth Amendments. Godfrey v. Georgia, 446 U.S. 420 (1980); Jackson v. Virginia, 443 U.S. 307 (1979). The essence of Furman v. Georgia, 408 U.S. 238 (1972) is that the Eighth Amendment is violated whenever "there is no meaningful basis for distinguishing the few cases in which [a death sentence]...is imposed from the many cases in which it is not." 408 U.S. at 313 (White, concurring). Thus, "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, supra, 446 U.S. at 428 (emphasis added). Specifically, the petitioner's contention that the two unreviewed aggravating circumstances were improperly applied by the sentencer in so vague and broad a manner as to violate the Eighth and Fourteenth Amendments has identical constitutional roots to the claim asserted in Godfrey. The en banc majority's view that federal review is limited to facially unconstitutional aggravating circumstances, or that the unreviewed aggravating circumstances are not challengeable on federal constitutional grounds, is wholly unsupported and is in direct conflict with prior decisions of this Court.[16]

Second, the en banc majority did not consider the appellate review of the two aggravating circumstances to be necessary because, under Louisiana law, they were unrelated to

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[16] Of course, analysis of any federal constitutional flaws should await the proper review of these aggravating circumstances by the Supreme Court of Louisiana.

the jury's power to impose the death penalty. Williams v. Maggio, supra, 679 F.2d at 389.[17] The difficulty with this conclusion is that there is no way to determine under the Louisiana capital sentencing scheme whether the jury relied on the unreviewed aggravating circumstances in returning a death verdict. The Louisiana statute, which is modelled after that of Georgia (State v. Martin, supra, 376 So.2d at 310), provides for a separate sentencing hearing after the defendant has been found guilty of a capital offense. La. Code Crim. Pro. Art. 905. During the sentencing hearing, the trial judge instructs the jury on the aggravating and mitigating circumstances under Louisiana law. The jury must be furnished with a copy of the statutory aggravating and mitigating circumstances. La. Code Crim. Pro. Art. 905.3. If the jury recommends a death sentence, it must designate in writing the aggravating circumstances or circumstances found beyond a reasonable doubt. La. Code Crim. Pro. Art. 905.3; 905.7. Even if it finds that one or more of the aggravating circumstances has been established beyond a reasonable doubt, the jury is not required to impose the death penalty. La. Code Crim. Pro. Art. 905.3; State v. Payton, 361 So.2d 866, 868-869 (La. 1978). The jury's verdict to impose the death sentence must be unanimous, La. Code Crim. Pro. Art. 905.6, but there is no statutory or judicial requirement that the jurors all vote for the death penalty because of the existence of the same aggravating circumstance. The jury's verdict therefore does not provide any indication what aggravating circumstances some or all of the jurors might have relied upon in reaching

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[17] The en banc majority seeks support for its conclusion in intimations from this Court's decisions in Gregg v. Georgia, 428 U.S. 153 (1976) and Godfrey v. Georgia, supra. Williams v. Maggio, supra, 379 F.2d at 390. However, the issue considered by the en banc court was not explicitly raised in these cases, and the certification question in Zant makes clear that the underlying questions have not been resolved in prior cases of this Court. See Williams v. Maggio, supra, 679 F.2d at 402 (Randall, dissenting).

their decision to impose the sentence of death, or the weight that might have been accorded each of the aggravating factors in the sentencing determination.[18]

Indeed, even though the en banc majority recognizes, as it must, that the unreviewed aggravating circumstances "went to the gravity of the petitioner's crime," and were "only material to deciding whether the aggravating and mitigating circumstances weighed together indicate the death penalty should be imposed," Williams v. Maggio, supra, 679 F.2d at 389, the Court of Appeals did not find any constitutional impropriety in the failure of the Supreme Court of Louisiana to review them. To reach this conclusion, the Court of Appeals necessarily had to speculate that the jury's decision to impose the death sentence was, as a matter of law, not influenced by two of the three factors it listed in support of the sentencing recommendation. Such speculation is clearly impossible in this case, id. at 401 (Randall, dissenting) and, in any event, it is impermissible under the Eighth and Fourteenth Amendments, for an appellate court is in no position to determine whether the scale was tipped towards death because of one or both of the unreviewed circumstances. Stromberg v. California, 283 U.S. 359, 368 (1931); Eddings v. Oklahoma, ___ U.S. ___ (1982)(O'Connor, concurring). (Woodson and Lockett require us to remove any legitimate bases for finding ambiguity concerning the factors actually considered by the sentencer.)

Finally, the en banc majority's approach is directly counter to the Eleventh Circuit's view in Proffitt v. Wainwright, 685 F.2d 1227, 1261-1266 (11th Cir. 1982). In Proffitt, the Court of Appeals concluded that Godfrey v. Georgia, supra,

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[18] Although framed in terms of a recommendation, the trial judge is bound by the jury's verdict. La. Code Crim. Pro. Art. 905.8.

authorized a federal court "to review a claim that a state court's construction of an aggravating factor provision in a particular case is so vague or broad as to violate Furman's requirement that sentencing decisions be guided by clear, objective, rationally reviewable standards." Id. at 1261. Indeed, the Eleventh Circuit specifically considered the application of a factor that was not even reviewed by the Florida Supreme Court. Id. at 1265. The Court of Appeals did note that it was not bound to follow the en banc majority's decision in the case at bar and distinguished Williams. Id. at n. 52. However, a fair reading of these cases reveals that their analysis and reasoning cannot be reconciled. This Court should resolve such an apparent conflict between two Circuits that encompass states with extremely large numbers of capital prosecutions and death sentenced prisoner.

In sum, the Supreme Court of Louisiana's truncated review procedure in the present case did not provide an adequate safeguard against the exercise of "uncontrolled discretion" by the sentencing jury. Godfrey v. Georgia, supra, 446 U.S. at 429. The en banc majority's tortured reasoning in upholding the process of review runs against the grain of capital sentencing law as it has been developed by this Court and other federal courts since Furman. Williams v. Maggio, supra, 679 F.2d at 405-409 (Randall, dissenting). Certiorari should be granted to permit consideration of whether a death sentenced prisoner has been provided meaningful appellate review when the reviewing court only considers one of three aggravating factors relied upon by the sentencer in deciding that his life should be taken.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER LOUISIANA'S UNIQUE PROCEDURE OF COMPARATIVE SENTENCE REVIEW OF DEATH CASES BY JUDICIAL DISTRICT, RATHER THAN ON A STATE-WIDE BASIS, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Supreme Court of Louisiana has adopted, and followed in this case, a procedure which is unique among states which have enacted capital punishment statutes: the state court reviews the proportionality of death sentences by comparing the sentence before it with those in other first degree murder cases from the same judicial district. Neither the statute mandating review of death sentences, nor the rule of the State Supreme Court establishing procedures for such review (Appendix E), provides for a review of the proportionality of each sentence in comparison with sentences in similar cases throughout the state. Indeed, one justice of the Supreme Court of Louisiana has expressly stated -- without contradiction by his colleagues -- that the state court has never engaged in state-wide proportionality review. State v. Prejean, 379 So.2d 240, 250 (La. 1980)(Dennis, dissenting from the denial of rehearing).

The Court of Appeals sets forth two dubious principles in upholding the Supreme Court of Louisiana's procedure. The first principle is that this Court has never implied that state-wide review is a constitutional requirement. Williams v. Maggio, supra, 679 F.2d at 395. The second draws a strained comparison between the cross-section requirement for an impartial jury and the proper geographical area for review of death sentences:

> Just as a venire chosen from a cross section of the community in which the crime is committed is an adequate constitutional safeguard against arbitrary imposition of verdicts and sentences, so a review of the murder convictions imposed within that venire community is sufficient to ensure against arbitrary imposition of the death penalty.
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> Id. at 395.

Consequently, the Court of Appeals concluded that the district wide review "provides adequate safeguards against freakish imposition of capital punishment." Id.

The decision of the Court of Appeals leaves states free, in a Circuit that contains a large number of capital prosecutions and death sentences, to adopt state-wide review, to reject it altogether, or to demarcate any geographical area as the appropriate base for the comparative review of death sentences. A brief examination of this Court's decisions will reveal that the approach towards state-wide review adopted by the Court of Appeals sharply clashes with this Court's assessment of the requisites for a constitutionally valid capital sentencing scheme.

The Court of Appeals' misunderstanding of this Court's decisions, and of the critical importance of state-wide review of capital sentences, point out the need for the exercise of certiorari jurisdiction. In Furman v. Georgia, 408 U.S. 238 (1972), this Court recognized that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." Gregg v. Georgia, 428 U.S. 153, 188 (1976). The linchpins of a constitutional death penalty scheme, as explained by this Court in its 1976 decisions, are procedural mechanisms which afford adequate guidance to the capital sentencing authority in each particular case and ensure fairness and even-handedness in capital sentencing throughout the jurisdiction. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); and Jurek v. Texas, 428 U.S. 262 (1976). Speaking of the latter requirement, this Court recognized that "the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner." Gregg v. Georgia, supra, 428 U.S. at

195. State-wide review is therefore designed to ensure the fair administration of a capital sentencing statute through a moderating and evening effect on sentences; in essence, it is a critical safeguard that prevents the arbitrary action of an aberrant jury or the capricious decision of a particular community towards specific crimes or individuals.

This crucial component of a constitutional death penalty statute was repeatedly emphasized in the 1976 decisions. For example, while the Texas scheme appears to have been the least detailed, this Court was nevertheless satisfied that:

> By providing prompt judicial review of the jury's decision in a court with state-wide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed, it does not violate the Constitution.
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> Jurek v. Texas, supra, 428 U.S. at 276 (emphasis supplied).

In Florida, though the state statute was apparently silent on sentence review, the state courts had assumed an obligation to review sentences and to ensure the even-handed application of the death penalty in the state; the assumption of this critical responsibility was viewed favorably by this Court. Profitt v. Florida, supra, 428 U.S. at 250-251.

Finally, this Court commented in detail upon the provisions in the Georgia statute that required mandatory review of all capital sentences by the Supreme Court of Georgia to ensure regularity in sentencing:

> In performing its sentence-review function, the Georgia court has held that if 'the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive.' Coley v. State, 231 Ga., at 834, 204 S.E.2d, at 616. The court on another occasion stated that 'we view it to be our duty under the similarity

> standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally...' Moore v. State, 233 Ga. 861, 864, 213 S.E.2d 829, 832 (1975). See also Jarrell v. State, supra, 234 Ga. at 425, 216 S.E.2d, at 270 (standard is whether 'juries generally throughout the state have imposed the death penalty'); Smith v. State, 236 Ga. 12, 24, 222 S.E.2d 308, 318 (1976)(found 'a clear pattern' of jury behavior).
>
> The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.
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> Gregg v. Georgia, supra, 428 U.S. at 204-206 (emphasis supplied).

The 1976 opinions of this Court make it clear that the lack of any procedure for a state-wide proportionality review makes it highly unlikely that the death penalty is being administered in a reliable, consistent and non-discriminatory manner throughout the state.

In contrast, review on less than a state-wide basis promotes arbitrary and capricious decisionmaking and encourages aberrant results. Indeed, once the "bright line" of the state boundaries is eliminated, there would be no reason to choose between the judicial district (employed by the Supreme Court of Louisiana), a parish or county, or a city or town. Furthermore, limitation of the scope of comparison to a particular geographical area would inevitably result in different policies towards the death penalty throughout the state. For example, in one area a particular crime might always result in a death sentence whereas the same crime would not receive the death

sentence in some other region in the state. Certainly, in a state like Louisiana, there might be very different approaches in a large metropolitan area like New Orleans or in a rural community.

Moreover, as the geographical area becomes increasingly smaller, it becomes more difficult to make the sort of meaningful comparisons mandated by the Eighth Amendment. For example, by referring only to a particular parish or judicial district, a court might conclude, as the state court did in petitioner's case, State v. Williams, supra, 383 So.2d at 375, that the death penalty for armed robbery murder in the particular case was not disproportionate or excessive because there had been no other armed robberies murders in the parish or the perpetrators of the few similar crimes also received a death sentence. In fact, however, expanding the scope of the analysis might reveal that in the balance of the state there have been dozens upon dozens of armed robbery murders in which the juries have consistently recommended life imprisonment. A jury in a particular area within the state may constitutionally be entitled to maintain its judgment that a novel is obscene, despite the overwhelming consensus to the contrary in the rest of the state (Jenkins v. Georgia, 418 U.S. 153 (1974)); a jury in a small town (or parish or judicial district) may not constitutionally, under the Eighth and Fourteenth Amendments, put a person to death when the overwhelming result in similar cases in the balance of the state has been to sentence the individual to life imprisonment.[19] District-wide review, therefore, fails to provide for the consistency and reliability that is so essential to the fair and even-handed administration of a state capital sentencing statute. Cf. Gregg v. Georgia, supra, 428 U.S. at 222-223 (White, concurring). Because of

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[19]Louisiana has 39 judicial districts and the Parish of Orleans has a separate set of courts. Therefore, there is a distinct possibility that there could be 40 different standards for imposing the death penalty in Louisiana; however, so long as there was some internal consistency in each judicial district, the review process of the state supreme court would not guarantee state-wide uniformity or consistency.

the extraordinary consequences of the capital sentencing process, this Court has stressed "the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976)(opinion of Stewart, Powell and Stevens, J.J.). Since review on a less than state-wide basis creates the risk of inconsistent and, therefore, unreliable results throughout the state, this Court, as it has done in the past, should grant certiorari to invalidate a procedural rule of the state supreme court that tends to "diminish the reliability of the sentencing determination." Beck v. Alabama, 447 U.S. 625, 638 (1980).[20]

Finally, Louisiana stands alone as the single state in the country where a statute or court rule specifically restricts the state supreme court to an examination of sentences from a geographical subdivision smaller than the state itself. The "nearly universal acceptance" of an approach to comparative review that is contrary to that adopted by Louisiana "establishes the value to the defendant of this procedural safeguard," and is a strong testament to the need for review in this Court of this aberrant procedure in a death case. Cf. Beck v. Alabama, supra, 447 U.S. at 637. While experimentation among states

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[20]The Court of Appeals considered that since the representative cross-section requirement adequately protects the defendant's Sixth Amendment right to a fair and impartial jury, comparative review on a district-wide basis ensures that death sentences are being meted out in a manner consistent with the requirements of the Eighth Amendment. Williams v. Maggio, supra, 679 F.2d at 395. This view is difficult to understand, and lacks citation to authority or constitutional underpinnings. To the contrary, it would appear obvious that compliance with the dictates of the Sixth Amendment does not necessarily ensure the reliable, consistent and non-arbitrary imposition of the death penalty that is required by the Eighth Amendment.

might be appropriate in some areas of capital sentencing litigation (compare the different procedures in Gregg, Proffitt, and Jurek), wholesale repudiation by the Supreme Court of Louisiana of one of the fundamental elements of a constitutional capital sentencing scheme should not be countenanced.

In sum, certiorari should be granted to consider whether district-wide sentencing review undermines a critical aspect of the capital sentencing schemes upheld in 1976 and, therefore, fails to "assure that sentences of death will not be 'wantonly' or 'freakishly' imposed. Furman v. Georgia, supra, 408 U.S. at 310 (Stewart, concurring).

CONCLUSION:

For the reasons mentioned above, the petitioner respectfully prays that the petition for writ of certiorari be granted.

Respectfully submitted,

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Attorney for Petitioner,
Robert Wayne Williams

Robert Wayne WILLIAMS,
Petitioner-Appellant,

v.

Ross MAGGIO, Jr., Warden and The Attorney General of the State of Louisiana, Respondents-Appellees.

No. 81-3159.

United States Court of Appeals,
Fifth Circuit.*
Unit A

June 21, 1982
Rehearing Denied Aug. 12, 1982.

State prisoner, who had been convicted of first-degree murder and sentenced to death, filed habeas corpus petition. The United States District Court for the Middle District of Louisiana, Frank J. Polozola, J., denied the petition, and prisoner appealed. A panel of the Court of Appeals, 649 F.2d 1019, affirmed, and prisoner's petition for rehearing en banc was granted. The Court of Appeals, Garza, Circuit Judge, held that: (1) trial court properly excluded prospective juror, who indicated that she was unwilling to consider the death penalty in the case; (2) where the jury imposed the death penalty after finding the presence of three aggravating circumstances, any one of which justified the penalty under Louisiana law, the Louisiana Supreme Court's review of the evidentiary sufficiency of only one of the aggravating circumstances was entirely proper; (3) defense counsel was not ineffective; and (4) comparative review of first-degree murder convictions on a judicial district, rather than a statewide basis, was sufficient to insure against arbitrary imposition of the death penalty.

Affirmed.

Randall, Circuit Judge, concurred in part and dissented in part and filed opinion in which Alvin B. Rubin, Politz, and Jerre S. Williams, Circuit Judges, joined.

Reavley, Circuit Judge, filed statement concurring in part in the opinion of Randall, Circuit Judge.

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

1. Jury ⇐108

Prospective jurors in capital case, who unequivocally stated their inability to consider the death penalty in the case, disqualified themselves from jury service.

2. Jury ⇐108

To be excluded in a capital case, a prospective juror need not aver that he would refuse to consider the death penalty in every case that could possibly arise; rather, he must be excluded if he knows enough about the case to be tried to state that he could not consider the imposition of the death penalty in that case.

3. Jury ⇐108

Trial court properly excluded prospective juror in capital case, who indicated that she was unwilling to consider the death penalty in the case, although she did leave open the possibility that she would consider the death penalty in a more hideous case.

4. Criminal Law ⇐1208(1)

Regardless of the number of aggravating circumstances returned by the jury in imposing the death penalty, in the absence of facial unconstitutionality, one circumstance may properly serve as the basis for appellate affirmation of the death sentence.

5. Criminal Law ⇐1208(1)

Where jury imposed death penalty after finding the presence of three aggravating circumstances, any one of which justified the penalty under Louisiana law, the Louisiana Supreme Court's review of the evidentiary sufficiency of only one of the aggravating circumstances was entirely proper. LSA-C.Cr.P. art. 905.4; U.S.C.A. Const.Amends. 8, 14.

6. Criminal Law ⇐641.13(6)

Information from one confidential informant, which was corroborated by information from the second confidential informant, provided probable cause for arrest, and, thus, accused's statements to police were not the fruit of an illegal arrest and

defense counsel's failure to seek suppression of such statements did not constitute ineffective assistance of counsel. U.S.C.A. Const.Amend. 4.

7. Criminal Law ⇐641.13(1)

Effective counsel does not mean errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.

8. Criminal Law ⇐641.13(6)

Defense counsel's failure to call certain character witnesses at sentencing phase of first-degree murder trial was part of counsel's trial strategy and did not constitute ineffective assistance. U.S.C.A.Const. Amend. 14.

9. Criminal Law ⇐641.13(2)

Defense counsel's argument in front of the jurors about the admissibility of photos of victim's body in prosecution for first-degree murder did not constitute ineffective assistance, where he did not present to the jury any information not already presented earlier in the trial and by presenting the argument he had the opportunity to educate the jury about the limited definition of the aggravating circumstance of especially heinous or atrocious crime. U.S.C.A.Const. Amend. 4; LSA–C.Cr.P. art. 905.4.

10. Criminal Law ⇐641.13(2)

Defense counsel's failure to request limiting instructions on the statutory aggravating circumstances to be considered by the jury in first-degree murder prosecution did not constitute ineffective assistance of counsel, where he presented the jury with a limited definition of both circumstances in his closing argument. LSA–C.Cr.P. art. 905.4; U.S.C.A.Const.Amend. 4.

11. Criminal Law ⇐641.13(6)

Assertion that defense counsel failed to conduct a proper pretrial investigation to discover character witnesses who could have testified in place of the accused's mother went to counsel's trial strategy, which could not form the basis of an ineffectiveness claim. U.S.C.A.Const.Amend. 4.

12. Homicide ⇐354

Comparative review of first-degree murder convictions on a judicial district, rather than statewide basis, was sufficient to insure against arbitrary imposition of the death penalty. Sup.Ct.Rules, Rule 28, 8 LSA–R.S.; U.S.C.A.Const.Amends. 8, 14.

Richard E. Shapiro, New Orleans, La., for petitioner-appellant.

Barbara B. Rutledge, Asst. Atty. Gen., New Orleans, La., John Sinquefield, Kay Kirkpatrick, Asst. Dist. Attys., Baton Rouge, La., for respondents-appellees.

Appeal from the United States District Court for the Middle District of Louisiana.

Before BROWN, CHARLES CLARK, GEE, RUBIN, GARZA, REAVLEY, POLITZ, RANDALL, SAM D. JOHNSON, WILLIAMS and GARWOOD, Circuit Judges.**

GARZA, Circuit Judge:

We begin our consideration of this case by tracing the steps that led petitioner to this Court. Petitioner Robert Wayne Williams was tried by a jury in East Baton Rouge Parish, Louisiana, and convicted of the crime of first degree murder on April 19, 1979. The following day, the jury sentenced Williams to death. On direct appeal, petitioner's conviction and sentence were affirmed by the Louisiana Supreme Court, *State v. Williams*, 383 So.2d 369 (La.1980), and certiorari was denied by the United States Supreme Court. *Williams v. Louisiana*, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 828 (1981). This failure to obtain relief on direct appeal led petitioner to apply for a writ of habeas corpus from the Louisiana state court. After this avenue proved equally unsuccessful, petitioner filed an application for a writ of habeas corpus in the United States District Court for the Middle District of Louisiana. That court ruled adversely to petitioner, and so he appealed to this Court. A panel of this Court upheld

** Judge Tate did not participate in the consideration or decision of this case.

the lower court decision, *Williams v. Blackburn*, 649 F.2d 1019 (5th Cir. 1981), but petitioner successfully petitioned for rehearing en banc. Today, for reasons expressed herein, we uphold the original panel decision and find that the death penalty was properly imposed in this case.

Before proceeding to a discussion of the specific errors complained of by petitioner, we briefly describe the sequence of events that culminated in the senseless murder of which petitioner was convicted. On January 5, 1979, Ralph Holmes and Robert Wayne Williams approached a Baton Rouge A & P Supermarket which they intended to rob. Prior to entering, they pulled ski masks over their faces to protect their identities from recognition, and Williams prepared his 12-gauge sawed-off shotgun for use. When they walked inside the store, they spotted the security guard, Willie Kelly, age 67, bagging groceries instead of performing his customary duties. The two men approached Kelly and Holmes attempted to remove the guard's pistol from its holster. He had some difficulty doing this, so Kelly made a move toward the pistol in an effort to free it and thereby aid Holmes. Williams responded to Kelly's move by firing the shotgun in the guard's face at point blank range. The resulting blast severed much of Kelly's head from his body. Police detectives on the scene observed bone fragments, blood, hair, and pieces of skin spread throughout the front of the store. After killing the guard, the two men proceeded to complete the robbery. Before fleeing the scene, however, Holmes pistol-whipped one customer, and Williams accidentally shot two more in the feet.

Six issues are raised by petitioner on rehearing en banc. He contends that: (1) his right to an impartial jury under the Sixth and Fourteenth Amendments was violated by the dismissal for cause of three jurors who never stated their irrevocable opposition to capital punishment; (2) his death sentence violates the due process clause of the Fourteenth Amendment because there was insufficient evidence to support two of the three aggravating circumstances found by the jury, namely, (a) that the petitioner knowingly created a risk of death or great bodily harm to more than one person and (b) that the offense was committed in an especially heinous, atrocious, or cruel manner; (3) the Supreme Court of Louisiana violated his rights under the Eighth and Fourteenth Amendments by reviewing the evidentiary sufficiency of only one of the three aggravating circumstances found by the sentencing jury; (4) the district court erred in denying petitioner an evidentiary hearing on the allegation that he was deprived of the effective assistance of counsel at the guilt and sentencing phases of his capital trial; (5) the district court failed to specifically scrutinize each federal constitutional claim made in the habeas petition; and (6) the comparative review of first degree murder convictions on a judicial district, rather than statewide basis, violates the Eighth Amendment and *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), because of its failure to ensure the fair and evenhanded administration of Louisiana's capital punishment statute.

I

The first point of appeal raised by Williams concerns the exclusion for cause of jurors who, in petitioner's estimation, never demonstrated their irrevocable opposition to capital punishment. He argues that his Sixth and Fourteenth Amendment right to an impartial jury was violated by these dismissals.

The seminal case in this area, *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), recognized the unconstitutionality of a death sentence imposed by a jury from which veniremen had been excused for cause simply because they expressed general objections to the death penalty or had conscientious or religious scruples against its infliction. The Court held that "[w]hatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution." *Id.* at 523, 88 S.Ct. at 1777. The requirements set out

in *Witherspoon* have been echoed by a plethora of subsequent Supreme Court and Fifth Circuit cases. *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976); *Maxwell v. Bishop*, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970); *Boulden v. Holman*, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969); *Alderman v. Austin*, 663 F.2d 558 (5th Cir. 1981); *Granviel v. Estelle*, 655 F.2d 673 (5th Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1636, 71 L.Ed.2d 870, —— U.S. ——, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982); *Burns v. Estelle*, 592 F.2d 1297 (5th Cir. 1979). Both Courts accept the state's power to exclude veniremen from a jury on the ground

> (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

Witherspoon, supra, at 522–23, 88 S.Ct. at 1777 (emphasis in original). At the same time, however, they also recognize that improper exclusion of even one juror on *Witherspoon* grounds removes from the state the power to impose a sentence of death.

Petitioner asserts that three jurors were incorrectly excluded on the basis of their opposition to the death penalty.[1] Close scrutiny of the voir dire examination of each juror is necessary for the resolution of this issue. Two of the jurors in question, Ms. Gooden and Mr. Martin, were interviewed together. The following excerpt of the district attorney's preliminary remarks and the jurors' responses to his inquiries about capital punishment clearly demonstrates the automatic opposition to the death penalty which justifies exclusion on *Witherspoon* grounds.

> The State is entitled to a juror that can state that if the case is proven and the statutory requirements involving the aggravating circumstances are shown, and you don't feel that the mitigating circumstances outweigh it, that you be able to return a verdict that would carry the mandatory death penalty. Death in Louisiana is still by electrocution. You may have read that some States have passed lethal injection and this type of thing, but that hasn't been passed in Louisiana. Death is still by electrocution. So I guess my next question is, hearing this explanation and knowing that the State will request the death sentence, if you were satisfied that the State had proved its case, could you return a verdict that would require this defendant to be put to death? . . .
>
> Q: Could you Mrs. Gooden?
>
> A: (Ms. Gooden) I don't think I could.
>
> Q: Even if I proved the case, you wouldn't want to return a verdict that would require the defendant to be put to death?
>
> A: (Ms. Gooden) No, sir.
>
> Q: Mr. Martin, could you return the verdict?
>
> A: (Mr. Martin) Sir, with the degree that I hold by being an officer of the church and I'm representing God, I wouldn't want to do it.
>
> Q: It's my understanding, of course, that all citizens would hesitate. I'm sure you would want to look at the case closely before you return a verdict that would require the defendant to be electrocuted, but it's my understanding that you Mr. Green, Mrs. Gooden and Mr. Martin, could not return a verdict that would require this defendant to be put to death. . . .
>
> A: (Ms. Gooden) No.
>
> A: (Mr. Martin) No.

Trial Transcript, vol. 1, at 83–84.

[1] Both Martin and Gooden unequivocally stated their inability to consider the death penalty in this case and thereby dis-

1. It is clear that these jurors were excluded on the basis of the first prong of *Witherspoon*: that they would automatically vote against imposition of the death penalty regardless of the evidence presented.

qualified themselves from jury service. Coexisting with the petitioner's right to an impartial jury, after all, is the State's right to have a jury that is willing to consider all penalties prescribed by law. A refusal to strike said jurors clearly would have infringed this right.

Next, we turn to the voir dire examination of the third juror, Ms. Brou. After the district attorney presented a similar introduction about the death penalty and the State's right to select jurors who are willing to consider all penalties, he engaged in the following colloquy with Ms. Brou:

Q: Assuming that I prove the defendant committed first degree murder and is convicted, assume I prove the statutory requirements of aggravating circumstances, which under Louisiana law make the case appropriate for the death penalty, can you return a verdict that mandates that the defendant be put to death by electrocution?

A: (Ms. Brou) I don't think I could do that.

Q: Okay. I appreciate your being honest with me. And let me ask you this. When you say I don't think I can, what you are telling me, you can't tell me positively that you can; is that correct?

A: (Ms. Brou) I know there is certain cases where you read about them and they are so hideous that you just think, oh, the death penalty would be the only good outcome, but this particular case, I don't know.

Q: As the Judge told you, this is the killing of a—Well, I don't know if the Judge said all that, but I think it is before the jury. This is the A & P robbery, murder that occurred on January the 5th of this year. And it is my understanding that you feel that you could not return the death penalty.

A: (Ms. Brou) Oh, let's see. I'm afraid I couldn't. I would just be thinking in terms of why can't a person like that be rehabilitated rather than exterminated.

Q: So you feel that you could not return the death penalty?

A: (Ms. Brou) No.

Q: Are there any circumstances which you could return a verdict that would require a defendant to be electrocuted?

A: (Ms. Brou) This particular one or just in general?

Q: This particular one.

A: Any circumstances where I could do that?

Q: Yes.

A: (Ms. Brou) Well, of course, I don't know that much about the case. I always think in terms of how hideous the crime is because I don't know that much about it. I don't know. I don't think I can do it.

Trial Transcript, vol. 1, at 185–86 (emphasis added).

The prosecuting attorney immediately moved to strike Ms. Brou for cause and no objection was interposed by defense counsel. We will not speculate about trial counsel's reasons for not objecting. Perhaps he did not want Ms. Brou on the jury for other reasons. But even if he had objected, his objection would not have been well-taken.

Petitioner charges that Ms. Brou's responses fall far short of demonstrating automatic opposition to the death penalty. He attributes the absence of *Witherspoon* talismanic responses on the record to the State's failure to propound hard questions about opposition to the death penalty. We disagree. If one examines the underscored portion of her statement, one clearly finds that she did state that she could not return a death sentence. When the prosecutor inquired again to assure that she could not consider this penalty, Ms. Brou responded that she did not think she could do it. When this response is viewed in conjunction with her previous statement of clear opposition to the death penalty, the record of automatic opposition to the death penalty is established.

[2, 3] *Witherspoon* and its progeny do not mandate that a prospective juror aver

that she would refuse to consider the death penalty in every case that could possible arise. If she knows enough about the case to know that she could not consider imposition of the death penalty regardless of what evidence might be presented, she must be excused. Ms. Brou's responses demonstrate that she would be unwilling to consider the death penalty where the crime charged was murder committed during a robbery. She does leave open the possibility that she would consider this penalty in a more "hideous" case. Her unwillingness to do so here, however, is firm.

By means of this appeal, petitioner asks this Court to narrow further the stiff requirements of *Witherspoon* and its progeny and, in this Court's opinion, thereby infringes the State's right to an impartial jury that is willing to consider all penalties provided by law.[2] According to petitioner's analysis, exclusion of a venireman is impermissible unless he states in response to all questions that he absolutely refuses to consider the death penalty. An equivalent response framed in any other reasonable manner is judged to demonstrate that the individual's position is not firm. We reject such a rigid, unthinking interpretation of *Witherspoon*. Form will not be placed over substance.

II

Petitioner next urges this Court to find his death sentence violative of the Four-

2. A comparison of this case with other recent Fifth Circuit cases in which *Witherspoon* error has been found permits us to judge the completeness of the prosecutor's questioning of Ms. Brou. In *Burns v. Estelle*, 592 F.2d 1297 (5th Cir. 1979), the prosecuting attorney asked the jurors about their opposition to the death penalty in the following language:

> All right. Then will the mandatory penalty of death or imprisonment for life affect your deliberation on any issue of fact, which what you just told me it will, in other words the mandatory penalty of death or imprisonment for life *will affect the deliberations on any issue of fact in this case, is that correct?*

Id. at 1303 (emphasis added.) This obviously is not equivalent to asking the venireman if he would either automatically vote against the death penalty or if this attitude about the death penalty would prevent him from making an impartial decision about defendant's guilt. Such a preliminary inquiry, not followed by specific questions, provides inadequate basis for striking a juror on *Witherspoon* grounds.

The following discussion between prosecutor and venireman occurred in *Granviel v. Estelle*, 655 F.2d 673 (5th Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1636, 71 L.Ed.2d 870, —— U.S. ——, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982):

> Q: (By Prosecutor) The defendant in this case is charged with capital murder. There are only two punishments for the offense of capital murder and that is either death or life in the penitentiary.
> Now, do you have conscientious scruples against the infliction of the death penalty as a punishment for crime?
> A: I don't know what that means.
> Q: Let me ask you if you, personally sitting as a Juror, could ever vote so as to inflict the death penalty?
> A: No, I don't think I could.
> Q: That is a *definite prejudice or feeling* that you have that you would not change? You just don't feel like you would be entitled to take another person's life in that fashion.
> A: (Venireman nods.)
> Q: Okay, you could not?
> A: No. I could not.

Id. at 684 (emphasis added). The death sentence in this case was reversed because the Court held that the venireman indicated only general scruples against the death penalty. Enough questions were not asked to determine whether he would automatically vote against the death penalty or whether his objections would prevent him from making an impartial decision as to guilt.

The instant case suffers from neither the deficiencies of *Burns* or *Granviel*. The district attorney asked a series of questions calculated to ensure that Ms. Brou was stating more than simply conscientious scruples about the death penalty.

A very recent Fifth Circuit *Witherspoon* challenge case, *Alderman v. Austin*, 663 F.2d 558 (5th Cir. 1981), treats another problem found in the voir dire of veniremen but likewise absent here. In *Alderman*, a death sentence was set aside because an extraneous issue introduced by the prosecutor resulted in the exclusion of potential jurors on a broader basis than that permitted by *Witherspoon*. The prosecutor did not limit his inquiry to an individual's opposition to the death penalty; he also asked whether each, as foreman, would be able to sign a verdict that would effect the capital punishment of a defendant. This forced veniremen to frame their answers improperly. The voir dire examination in the instant case properly limits its scope to an inquiry about opposition to the death penalty.

teenth Amendment due process clause because of the insufficiency of evidence to support two of the three aggravating circumstances found by the jury. The jury imposed the death penalty after finding the presence of three aggravating circumstances, any one of which justified the punishment petitioner received. These three aggravating circumstances were: (1) the offender was engaged in the perpetration of armed robbery; (2) the offender knowingly created a risk of death or great bodily harm to more than one person; and (3) the offense was committed in an especially heinous, atrocious, or cruel manner.[3]

Before embarking on a discussion of the substantive law in this section of the appeal, we examine the evolution that has produced the current Louisiana death penalty statute. Prior to the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), Louisiana statute permitted the jury to return any one of the following verdicts in a murder case: guilty, guilty without capital punishment, guilty of manslaughter, or not guilty.[4] In 1973, apparently in response to the *Furman* decision, the legislature altered the capital punishment statute from discretionary to mandatory. The amended statute required that the penalty of death be imposed whenever an offender was found guilty of the newly defined crime of first degree murder.[5] The Supreme Court declared this statute unconstitutional in *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), holding that "[t]he Louisiana procedure neither provides standards to channel jury judgments nor permits review to check the arbitrary exercise of the capital jury's de facto sentencing discretion." *Id.* at 335, 96 S.Ct. at 3007.

The direction provided by the Supreme Court in *Roberts* led Louisiana to once again change its capital punishment scheme to ensure that a jury has the opportunity to consider all mitigating factors proffered as a basis for a sentence less than death. The statute also requires the jury to find at least one of a list of aggravating circumstances in order to impose a death sentence.[6] When sitting in review of capital

3. La.Code Crim.Pro.Ann. art. 905.4(a), .4(d), and .4(g) (West Supp. 1981).

4. La.Code Crim.Pro.Ann. art. 814 (1967).
The murder statute in effect at this time defined the crime as the killing of a human being by an offender with the specific intent to kill or to inflict great bodily harm, or by an offender engaged in the commission of certain serious felonies (aggravated arson, aggravated burglary, aggravated kidnapping, aggravated rape, armed robbery, and simple robbery). La. Rev.Stat.Ann. § 14:30 (1951).

5. La.Rev.Stat.Ann. § 14:30 (West 1974):
First degree murder is the killing of a human being:
(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or
(2) When the offender has a specific intent to kill, or to inflict great bodily harm upon a fireman or a peace officer who was engaged in the performance of his lawful duties; or
(3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or
(4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; [or]
(5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.
For the purposes of Paragraph (2) hereof, the term peace officer shall be defined and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney, or district attorneys' investigator.
Whoever commits the crime of first degree murder shall be punished by death.

6. La.Code Crim.Pro.Ann. art. 905.4 (West Supp. 1981):
The following shall be considered aggravating circumstances:
(a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;
(b) the victim was a fireman or peace officer engaged in his lawful duties;
(c) the offender was previously convicted of an unrelated murder, aggravated rape, or

cases, the state Supreme Court must find the presence of at least one aggravating circumstance beyond a reasonable doubt. In addition, the court must examine all possible mitigating circumstances and compare the case with all other murder cases from the affected judicial district in order to ensure that the sentence is not disproportionate. This procedure was strictly followed in the instant case. Petitioner charges that this is not sufficient.

Petitioner contends that in light of the care of the Supreme Court to adopt narrowing constructions of aggravating circumstances, *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), two of the three aggravating circumstances found by the jury cannot stand. Consequently, his argument continues, the sentence of death must fall as well. Petitioner finds support for this conclusion in *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), *cert. granted*, 454 U.S. 814, 102 S.Ct. 90, 70 L.Ed.2d 82 (1981), a case currently pending before the Supreme Court.

In *Stephens*, a panel of this Court vacated a death sentence because one aggravating circumstance found by the jury, a substantial history of serious assaultive criminal convictions, was later held unconstitutional. This action was taken despite the presence of two other valid aggravating circumstances. The Court based its decision on *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), where the Supreme Court held:

> The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause.... It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.

Id. at 368, 51 S.Ct. at 535.

The two challenged aggravating circumstances in this case do not suffer constitutional defects. In *Gregg v. Georgia, supra*, the Supreme Court held that a similar ag-

aggravated kidnapping or has a significant prior history of criminal activity;

(d) the offender knowingly created a risk of death or great bodily harm to more than one person;

(e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) the offense was committed in an especially heinous, atrocious, or cruel manner; or

(h) the victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(i) the victim was a correctional officer or any employee of the Louisiana Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

For the purposes of Subparagraph (b) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

gravating circumstance in the Georgia statute was not unconstitutional on its face.[7] The Court noted that this aggravating circumstance must simply be properly limited by an appellate court, where it serves as the basis for the death sentence. In the instant case, this aggravating circumstance, although found by the jury, was not the basis for appellate approval of the sentence. Since Louisiana law requires that only one aggravating circumstance be found in order to justify imposition of the death penalty, only one circumstance was reviewed.[8] This aggravating circumstance has not been attacked to date in petitioner's series of challenges to his conviction and sentence.

The crucial inquiry in this and every case in which capital punishment has been ordered is whether the jury's sentencing discretion was properly channeled. *E.g., Roberts v. Louisiana, supra.* By statute, the jury's discretion is limited to the extent that only a few types of killings permit consideration of the death penalty. When one or more of the statutory aggravating circumstances is found, the jury must balance this against the mitigating circumstances offered by defendant. *Stephens v. Zant* can be distinguished on the grounds that the unconstitutionally vague aggravating circumstances which the *Stephens* jury found to be present was one that required the jury to understand how to determine the meaning of facts and circumstances not before them as a part of the proof of that crime. This required that the jury be properly guided as to how Georgia classified the aggravating circumstance before they could consider evidence of the other criminal convictions and the impact of this proof on the assessment of the death penalty. The vague words of the Georgia statute failed to guide or channel their discretion.

The instant case is not similarly flawed. The jury was only permitted to weigh the specific facts of the crime in arriving at their decision. The aggravating circumstance of armed robbery-murder was present and unanimously found by the jury. Under Louisiana law this means that the two questioned aggravating circumstances are not necessary to entitle the jury to consider imposition of the death penalty. The extra findings went to the gravity of his crime, not the jury's power to impose the death penalty.

Since the requisite one aggravating circumstance of murder in the course of an armed robbery is clearly present and was unanimously found by the jury, the other two circumstances are only material to deciding whether the aggravating and mitigating circumstances weighed together indicate the death penalty should be imposed. Here, the thing of significance is how the jurors perceived the weight of these actions by petitioner. The weight they assigned in determining whether the petitioner's acts were or were not outweighed by mitigating circumstncesa necessarily o be ested by how they viewed the facts they properly knew. The jury necessarily focused on what Williams had done, not on how Louisiana classified his actions, since they were not instructed on the legal meaning of the terms involved. Louisiana's classifications did not change the weights the jury assigned in any material degree. The lack of precise legal definitions, therefore, affected none of petitioner's substantial rights.

7. Ga.Code Ann. § 27-2534.1 (Supp. 1975) provides, in part:

> (7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

Petitioner contends that this Court is precluded from holding the third aggravating circumstance valid because it is bound by the finding of the Louisiana Supreme Court that petitioner "accidentally" shot the others he injured. 383 So.2d at 371. An offender must "knowingly" create a risk of harm to more than one person in order to come within the scope of this circumstance. However, the second discharge of the gun is not relevant here. Although the basis of our decision does not mandate a determination on the presence of this circumstance, we note that whenever a sawed-off shotgun is intentionally fired around a group of persons, the risk of harm to more than one individual is created.

8. The Louisiana Supreme Court found that petitioner committed the murder while engaged in the perpetration of an armed robbery.

It might have been better if the trial judge had permitted the jury to consider only the aggravating circumstances that legally could be present, and if the judge had defined those circumstances for the jury in such a way that their finding that the circumstances were proven had been fully informed, perhaps it could be said that a more fully instructed jury would not have found the aggravating circumstances of heinousness and risk to more than one person to be present. This speculation is beside the mark, however, because the meaningful portions of this verdict, (1) that at least one aggravating circumstance was present and (2) that under the totality of aggravating and mitigating circumstances the death penalty should be imposed, were the product of channeled discretion and are rationally reviewable.

This Court's opinion in *Stephens v. Zant*, relied on so heavily by petitioner, is simply inapposite. We do not confront a facially unconstitutional aggravating circumstance and, therefore, we need not vacate the sentence given. The aggravating circumstances which were not considered and limited by the appellate court do not serve as the basis for the death sentence. We base the sentence on the one circumstance considered by the Louisiana Supreme Court. In so acting, we follow the procedure implicitly utilized in several Supreme Court cases. *See, e.g. Eddings v. Oklahoma*, — U.S. —, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Gregg v. Georgia, supra*.

[4, 5] In *Gregg*, the first Supreme Court case to consider the constitutionality of an aggravating circumstance very similar to one challenged here, the Court pointed out that it need not discuss two cases where this aggravating circumstance had been found because "[i]n both cases a separate statutory circumstance was also found, and the Supreme Court of Georgia did not explicitly rely on the finding of the seventh circumstance [outrageous or wantonly vile, horrible or inhuman murder] when it upheld the death sentence." 428 U.S. at 201 n.53, 96 S.Ct. at 2938, n.53, 49 L.Ed.2d at 890 n.53. The Supreme Court again implied approval of the reasoning employed herein in *Godfrey v. Georgia, supra*, where at the same time the Court vacated a death sentence it noted, "[t]he sentences of death in this case rested exclusively on § (b)(7). Accordingly, we intimate no view as to whether or not the petitioner might constitutionally have received the same sentences on some other basis. Georgia does not, as do some states, make multiple murders an aggravating circumstance." 446 U.S. at 432 n.15, 100 S.Ct. at 1767 n.15, 64 L.Ed.2d at 409 n.15. Irregardless of the number of aggravating circumstances returned by the jury, the implication is clear that, in the absence of facial unconstitutionality, one may properly serve as the basis for appellate affirmation of the death sentence. The most recent Supreme Court comment on this issue is found in *Eddings v. Oklahoma, supra*, where after expressing "doubt that the trial judge's understanding and application of this aggravating circumstance [heinous, atrocious, or cruel murder] conformed to that degree of certainty required by our decision in *Godfrey v. Georgia* ...," — U.S. at —, n.3, 102 S.Ct. at 873 n.3, the Court did not find this a basis for reversal of the death sentence but instead went further to find the judge's failure to consider all possible mitigating factors as the reversible error.

The Louisiana Supreme Court's review of only one aggravating circumstance was entirely proper. We find no violation of either the Eighth or Fourteenth Amendment.

III

Petitioner contends that the court below erred in denying him an evidentiary hearing on allegations of ineffective assistance of counsel at both the guilt and sentencing phases of his trial.

[6] First, we examine the claim of ineffective assistance of counsel at the guilt phase of the trial. Petitioner alleges that his attorneys failed to seek suppression of certain inculpatory statements on a well recognized Fourth Amendment ground. The statements in question, which figured importantly in his conviction, were the

fruits of an illegal arrest, according to petitioner; despite the fact that information leading to his arrest was obtained from a confidential informant, the affidavit contains no indication of the reliability of the informant. Petitioner errs in his assessment of the facts. The presentence report contains information from two confidential informants.[2] The affidavit of the second confidential informant amplifies and corroborates the information received from the first. Information from these two sources provided probable cause for arrest.

Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), established standards for judging the sufficiency of hearsay affidavits to establish probable cause. The Court recognized that an affidavit may be based on hearsay information but specified:

> ... the magistrate must be informed of [1] some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and [2] some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, ... was "credible" or his information "reliable." Otherwise, "the inferences from the facts which lead to the complaint" will be drawn not "by a neutral and detached magistrate," as the Constitution requires, but instead, by a police officer "engaged in the often competitive enterprise of ferreting out crime," ... or, as in this case, by an unidentified informant.

378 U.S. at 114–15, 84 S.Ct. at 1514, 12 L.Ed.2d at 729. The weakness of the affidavits in the instant case relates to the second prong of the *Aguilar* test. Nowhere in the affidavits is there any indication of the informants' reliability. Petitioner views this as a fatal flaw. We disagree. This Court, in *United States v. Martin*, 615 F.2d 318 (5th Cir. 1980), affirmed the validity of similar affidavits. The Court held that, taken together, the corroboration of the two affidavits served to establish their reliability. The Court pointed out that the usual case in which corroborative evidence validates a tip involves independent verification by police investigation. *See, e.g., Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959); *United States v. Squella-Avendano*, 447 F.2d 575 (5th Cir. 1971), *cert. denied*, 404 U.S. 985, 92 S.Ct. 450, 30 L.Ed.2d 369 (1971). While this Court has held that substantial corroboration of a tip by another confidential informant does provide evidence of reliability, these cases also reported independent governmental verification of the information. *See United States v. Farese*, 612 F.2d 1376 (5th Cir. 1980); *United States v. Barham*, 595 F.2d 231 (5th Cir. 1979); *United States v. Scott*, 555 F.2d 522, 527 (5th Cir.), *cert. denied*, 434 U.S. 985, 98 S.Ct. 610, 54 L.Ed.2d 478 (1977). Even in *Martin*, reliability was not based solely on corroboration by the confidential informant. Some weight was given to the fact that one informant's statement was against his penal interest.

In the instant case, however, corroboration alone serves to satisfy the second prong of *Aguilar*. The statement of one confidential informant is amplified by the other. We believe that the corroboration of details provides the reliability which the *Aguilar* test mandates. Therefore, petitioner had no basis for asserting his statements to

2. The affidavit, which contains information from two confidential informants, states, in relevant part:

> On 1-10-79 Dets [detectives] received information from a confidential informant, who stated that he was present when 2 B/MS [black males] and 1 B/F [black female] bragged about beating a white man in the head and shooting an "Old Guard" at the A & P Food Store in Perkins Rd. in Baton Rouge. He saw in their possession, a sawed off shotgun and a large amount of currency. He identified one of the B/MS as Robert Holmes B/M, of 2216 Minnesota, BR, and the other B/M, as "Slim" of 2242 Minnesota, BR. He identified the B/F as Slim's wife. Another C.I. [confidential informant] supplied the name of "Slim" as Robert Williams B/M, of 2242 Minnesota and his wife as being Ann Sims Williams, approx. age 17 of 275 W. Harrison. He also personally knows Ralph Holmes and stated he heard the three talk about "doing" a robbery at the A & P Food Store and killing an "Old Guard.".

police were the fruit of an illegal arrest. This claim is without merit.

[7] Ineffective assistance of counsel at the sentencing phase of trial is also charged by petitioner. Specifically, petitioner alleges that his trial attorneys failed to conduct an adequate investigation and to prepare properly for the sentencing hearing, since they neglected to interview readily available witnesses in mitigation of punishment and to familiarize themselves with the pertinent law relating to capital sentencing proceedings in Louisiana. In this Circuit, effective assistance of counsel is determined by the standards set forth in *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960), *modified*, 289 F.2d 928 (5th Cir.), *cert. denied*, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961); *United States v. Gray*, 565 F.2d 881 (5th Cir.), *cert. denied*, 435 U.S. 955, 98 S.Ct. 1587, 55 L.Ed.2d 807 (1978); *Herring v. Estelle*, 491 F.2d 125 (5th Cir. 1974). Effective counsel does not mean "errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." 280 F.2d at 599.

[8] Petitioner asserts that the failure to call certain character witnesses demonstrates the weakness of his counsel. He attached affidavits of these witnesses to his federal habeas corpus application. The district court made the following finding about this issue: "[A] careful review of these affidavits reveals that these witnesses would not have added any new evidence to that which had already been presented at the sentencing hearing by petitioner's mother. These affidavits contain cumulative testimony which had previously been introduced during the trial and at the sentencing hearing." *Williams, supra*, at 1025.[10] The trial transcript of this case reveals that three witnesses who knew petitioner were called at the guilt phase of the trial. The individuals had known the petitioner twelve, nine and one year, respectively. They testified about his drug usage because petitioner based his defense on the inability to conform his conduct to the requirements of the law because of intoxication. What petitioner's present counsel is really objecting to is the trial strategy employed by trial counsel. We do not elect to second guess the trial strategy decisions of competent counsel.

[9] Petitioner next argues that trial counsel made a serious error in arguing about the admissibility of photos of the body in front of the jury. He contends that this discussion revealed the gruesome nature of the photos to the jury in graphic terms. This argument is utterly without merit. The "gruesome" facts referred to were the district attorney's remarks that it was heinous to "have your face blown off in front of the people you've worked with and the people that you know and exactly what this man did to the victim in this case." Trial Transcript, vol. 2, at 267. These comments do not introduce to the jury any information not already presented earlier in trial. Furthermore, by presenting this argument in front of the jury, petitioner's counsel had the opportunity to educate the jury about the limited definition of the aggravating circumstance of especially heinous or atrocious crime.[11]

10. Of the six affidavits attached to petitioner's application for post conviction relief, five are from individuals who had known petitioner since childhood but had seen very little of him in recent years. All concluded that drugs or bad influences had brought about his criminal conduct. The other affidavit was that of his older brother, Alvin, who blamed his conduct on the use of "heavy drugs."

11. MR. COVELL: Your Honor, the code provides that one aggravating circumstance is an especially heinous or atrocious crime. I think the Legislature, when they passed that law, had a test or their intent was to judge the suffering of the victim, not his appearance after death. Now, to my way of thinking, it's a terrible thing that this man is dead, but he died instantly. And it is not of import whether it was a nice, clean, 25 caliber wound or whether it was a shot gun. He did not know what happened. I therefore submit to the Court that these pictures are not relevant because they do not demonstrate or indicate an especially atrocious or heinous crime. I think what the Legislature had in mind were crimes that we hear about such as repeated rapes and murder of a small girl or that sort of thing where the victim suffered

[10] Petitioner's next assignment of error relates to counsel's failure to request limiting instructions on the statutory aggravating circumstances that were considered by the jury. The jury did hear the limited definition of the heinous crime circumstance, however, when counsel argued the admissibility of photos of the body. In addition, counsel presented the jury with a limited definition of both circumstances in his closing argument.[12] Consequently, counsel's inaction does not rise to the level of ineffective assistance of counsel.

[11] Petitioner's final argument charges counsel with failure to conduct a thorough pre-trial investigation. Counsel would have discovered many good character witnesses if he had undertaken proper pre-trial investigation, he asserts, and then would possibly have decided not to have petitioner's mother testify but would have depended on favorable testimony from members of the community. This challenge to counsel's performance attempts to do precisely that which is barred by this Court; it invites us to question counsel's trial strategy and judge his performance incompetent if it was not errorless. We decline to take this action. There is little doubt that had trial counsel employed the trial strategy proposed by petitioner, this Court would now face an effectiveness of counsel argument based thereon. Trial counsel in this case made the best of a bad case. He certainly provided reasonably effective assistance. Since we find adequate support in the record for our decision, there is no need to return this case to the court below for an evidentiary hearing. No further judicial time need be wasted on such spurious challenges.

IV

Next in this series of challenges, petitioner alleges that the district court failed to specifically scrutinize each federal constitutional claim in his habeas petition. Of his thirteen original grounds for post conviction relief, petitioner asserts that eight have never been addressed.[13] He is incorrect.

Trial Transcript, vol. 2, at 265–66.

12. The offense was committed in an especially heinous, atrocious or cruel manner. You heard my argument to the Court. What the Legislature has in mind is—the victim, Willie Kelly, died suddenly. I doubt if he had a chance to even realize what was happening to him. The testimony was that they came in, all of a sudden he saw them. He started to make a gesture, we don't know what the gesture was, and he was dead. As I stated, it's unfortunate. It's a sickening thing that the man is dead, but he died instantly. *Like I argued to the judge, and the judge agreed with me because he felt that the pictures should not be introduced into evidence.* It doesn't matter if it's a little nice, clean bullet hole or if it's a shot gun blast that is disgusting and bothers other people around. He died, he died, I believe the prosecutor commented he deserved to die in a more dignified manner. If the prosecution can demonstrate one sort of murder that is dignified, I'd like to hear it.

No murder is dignified.

Trial Transcript, vol. 2, at 284 (emphasis added).

Defense counsel also presented a limited definition of the other aggravating circumstance:

Now, every sort of crime in which a weapon's involved or which a murder takes place, certainly anyone in the area is going to be in fear of their lives. I'm sure the Legislature didn't mean that in every case in which a gun was used this would apply. There would be no sense in having this.

Trial Transcript, vol. 2, at 283–84.

13. The specific claims are:

(3) Petitioner's death sentence violates the due process clause of the Fourteenth Amendment because there was insufficient evidence to support the jury's finding that (a) the offender knowingly created a risk of death or great bodily harm to more than one person; and (b) the offense was committed in an especially heinous, atrocious or cruel manner.

(4) The jury's finding that the offense was committed in an especially heinous, atrocious or cruel manner was in violation of the decision rendered in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

(6) The trial court erred in failing to provide the jury with limiting instructions on the statutory aggravating circumstances.

(7) The Louisiana Supreme Court has adopted inconsistent standards of appellate review thereby increasing the likelihood of arbitrary and capricious sentencing in death cases.

(9) The death sentence imposed upon petitioner was disproportionate and excessive under Louisiana law and the Eighth and

Three of these claims, numbers three, nine, and twelve, were specifically rejected by the Louisiana Supreme Court. The district court committed no error by concurring with that court's analysis. Our decision in part II of this opinion disposes of the need to discuss claims four, six, and seven, since these are predicated on the faulty assumption that *Stephens v. Zant* applies to this case.[14] Claim number ten attacks the failure to adequately instruct the jury about the weight and role of mitigating circumstances. After closely examining the trial court record, we have determined that this claim is spurious. Claim eleven also concerns mitigating circumstances; here petitioner asserts that lack of statutory guidance about mitigating circumstances renders the Louisiana death penalty statute unconstitutional. This claim is likewise without merit.

V

As a final point of appeal, petitioner contends that the comparative review of first degree murder convictions on a judicial district, rather than statewide, basis violates the Eighth Amendment and *Furman v. Georgia, supra*, because of its failure to ensure the fair and evenhanded administration of Louisiana's capital punishment statute.[15]

Fourteenth Amendments to the Constitution of the United States.

(10) The trial court erroneously instructed the jury concerning the mitigating circumstances and the role of such circumstances in determining a death sentence.

(11) The Louisiana death penalty statute is unconstitutional under the Eighth and Fourteenth Amendments to the Constitution of the United States.

(12) The trial court erred in allowing the state to present evidence of an armed robbery at petitioner's trial on the charge of first degree murder.

14. Petitioner's counsel also waived number six at oral argument when he stated that error was not committed when the judge failed to give limiting instructions on the statutory aggravating circumstances. He declared that error was committed when the jury found an aggravating circumstance for which there was improper basis.

15. Louisiana Supreme Court Rule 28 governs capital sentence review:

Rule 905.9.1 Capital sentence review (applicable to La.C.Cr.P. Art. 905.9)

Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Section 2. Transcript, Record. Whenever the death penalty is imposed a verbatim transcript of the sentencing hearing, along with the record required on appeal, if any, shall be transmitted to the court within the time and in the form, insofar as applicable, for transmitting the record for appeal.

Section 3. Uniform Capital Sentence Report; Sentence Investigation Report.

(a) Whenever the death penalty is imposed, the trial judge shall expeditiously complete and file in the record a Uniform Capital Sentence Report (see Appendix "B"). The trial court may call upon the district attorney, defense counsel and the department of probation and parole of the Department of Corrections to provide any information needed to complete the report.

(b) The trial judge shall cause a sentence investigation to be conducted and the report to be attached to the uniform capital sentence report. The investigation shall inquire into the defendant's prior delinquent and criminal activity, family situation and background, education, economic and employment status, and any other relevant matters concerning the defendant. This report shall be sealed, except as provided below.

(c) Defense counsel and the district attorney shall be furnished a copy of the completed Capital Sentence Report and of the sentence investigation report, and shall be afforded seven days to file a written opposition to their factual contents. If the opposition shows sufficient grounds, the court shall conduct a contradictory hearing to resolve any substantial factual issues raised by the reports. In all cases, the opposition, if any, shall be attached to the reports.

(d) The preparation and lodging of the record for appeal shall not be delayed pending completion of the Uniform Capital Sentence Report.

Section 4. Sentence Review Memoranda; Form; Time for Filing.

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(d) The preparation and lodging of the record for appeal shall not be delayed pending completion of the Uniform Capital Sentence Report.

Section 4. Sentence Review Memoranda; Form; Time for Filing.

In reviewing the sentence in this case, the Louisiana Supreme Court made the following comparison of this case with other murder cases in the district:

> The sentence review memoranda shows that there have been 28 murder prosecutions in East Baton Rouge Parish with eleven resulting in first degree murder convictions. Of these eleven, only three of the defendants were sentenced to death. These three cases are strikingly similar in that all three defendants were the actual killers and the crimes all arose during the perpetration of armed robberies. *See State v. Williams*, 383 So.2d 369 (La.1980) (No. 65,563); *State v. Clark*, No. 66,573, appeal pending.
>
> Thus, a review of the sentences imposed in the same parish shows that in the cases most similar to the defendant's, the death penalty was imposed. Our review also shows a dissimilarity between the defendant's case and the other first degree murder convictions in that arguably, there are no aggravating circumstances or there were present mitigating circumstances which justified the jury's recommendation of life imprisonment.
>
> In light of the above considerations, we are unable to conclude that the sentence imposed here is disproportionate to that imposed in similar cases.

383 So.2d at 375 (citations omitted).

[12] Although the Supreme Court has referred to statewide reviews as commendable in the effort to ensure against an arbitrary imposition of the death penalty, it has never implied that such review is a constitutional requirement. *Gregg v. Georgia, supra; Proffitt v. Florida, supra; Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). The review quoted above provides adequate safeguards against freakish imposition of capital punishment. Just as a venire chosen from a cross section of the community in which the crime is committed is an adequate constitutional safeguard against arbitrary imposition of verdicts and sentences, so a review of the murder convictions imposed within that venire community is sufficient to ensure against arbitrary imposition of the death penalty. We concur with the statement in the panel decision of this case that "we have heard nothing which would even hint at unconstitutionality, and wholly reject the argument." 649 F.2d at 1021.

VI

After carefully scrutinizing petitioner's many points of appeal, we conclude that each lacks merit. Certainly, we do not take lightly such a judgment where, as here, a human life hangs in the balance. Although we comply with our duty to carefully consider petitioner's claims, we refuse to step further and assist in counsel's efforts to ban the death penalty. Therefore, we decline petitioner's invitation to enter the jury room and speculate on what happened therein. Louisiana has properly narrowed

> (a) In addition to the briefs required on the appeal of the guilt-determination trial, the district attorney and the defendant shall file sentence review memoranda addressed to the propriety of the sentence. The form shall conform, insofar as applicable, to that required for briefs.
>
> (b) The district attorney shall file the memorandum on behalf of the state within the time provided for the defendant to file his brief on the appeal. The memorandum shall include:
>
> i. a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant.
>
> ii. a synopsis of the facts in the record concerning the crime and the defendant in the instant case.
>
> iii. any other matter relating to the guidelines in Section 1.
>
> (c) Defense counsel shall file a memorandum on behalf of the defendant within the time for the state to file its brief on the appeal. The memorandum shall address itself to the state's memorandum and any other matter relative to the guidelines in Section 1.
>
> Section 5. Remand for Expansion of the Record. The court may remand the matter for the development of facts relating to whether the sentence is excessive.

juries' sentencing discretion in capital cases. The Louisiana Supreme Court conducts thorough and proper review of all cases.[16] Chief Justice Burger, in his dissent in *Eddings v. Oklahoma*, *supra*, expressed a thought most relevant here: "It can never be less than our most painful of duties to pass on capital cases ... However, there comes a time in every case when a court must 'bite the bullet.'" *Id.* —— U.S. at ——, 102 S.Ct. at 883. That time has arrived.

AFFIRMED.

RANDALL, Circuit Judge, with whom RUBIN, POLITZ and JERRE S. WILLIAMS, Circuit Judges, join, concurring in part and dissenting in part:

Because I think that the jury that convicted the defendant was fatally tainted by the improper exclusion of a juror for cause, I respectfully disagree with the majority and I would, on that ground alone, reverse the judgment of the district court denying the writ as to the sentencing phase and remand for a new sentencing hearing. That disposition would render it unnecessary to consider the remaining asserted constitutional errors in the sentencing phase. Since the majority is required to address those errors by virtue of its conclusion (and based on the premise) that the juror was properly excluded, I shall address the majority's conclusions as to those errors. With respect to the asserted errors stemming from the lack of sufficient evidence to support two of the three aggravating circumstances found by the jury, I believe that this court is required by the Supreme Court's decision in *Zant v. Stephens*, —— U.S. ——, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), to certify to the Supreme Court of Louisiana the same question that the Supreme Court in *Zant* certified to the Supreme Court of Georgia. I respectfully disagree with the majority that the two cases can be distinguished on a principled basis, and I dissent from the implicit decision of the majority not to certify that question to the Supreme Court of Louisiana. I concur in the balance of the judgment rendered in Parts III and IV of the majority opinion although in one instance for a different reason than that set forth in the majority opinion.

I.

Veniremen with reservations about capital punishment may be excluded from jury service *only* if they make *unmistakably clear* that:

> "(1) they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*."

Witherspoon v. Illinois, 391 U.S. 510, 522-23 n.21, 88 S.Ct. 1770, 1777 n.21, 20 L.Ed.2d 776 (1968) (emphasis in original).

There was nothing in the State-Brou colloquy to indicate that Ms. Brou's attitude toward the death penalty would prevent her from making an impartial decision as to Williams' guilt, and the State does not rely on that ground for her exclusion. The majority finds, however, that Ms. Brou voiced automatic opposition to imposition of capital punishment without regard to any evidence that might be developed at trial.[1]

16. We note in passing that since implementation of Louisiana's current death penalty scheme, the Louisiana Supreme Court has vacated more death sentences than it has affirmed. The sentence of death was vacated in the following cases: *State v. Willie*, 410 So.2d 1019 (La.1982); *State v. Lindsey*, 404 So.2d 466 (La.1981); *State v. Smith*, 400 So.2d 587 (La. 1981); *State v. Sylvester*, 400 So.2d 640 (1981); *State v. Williams*, 392 So.2d 619 (La.1980); *State v. Culberth*, 390 So.2d 847 (La.1980); *State v. Myles*, 389 So.2d 12 (La.1980); *State v. Sonnier*, 380 So.2d 1 (La.1980); *State v. Parker*, 372 So.2d 1037 (La.1979); *State v. English*, 367 So.2d 815 (La.1979). We exclude from the foregoing list two cases in which the sentence was vacated but subsequently reimposed and affirmed. *State v. Sonnier*, 402 So.2d 650 (La. 1981); *State v. Monroe*, 397 So.2d 1258 (La. 1981).

1. The majority does not contend that Williams is barred, under the holding of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d

The majority opinion sets forth a portion of the colloquy with Ms. Brou, underscoring one question and one response. Then, in three sentences, the majority construes that testimony to establish a "record of automatic opposition to the death penalty:"

> If one examines the underscored portion of her statement, one clearly finds that

594 (1977), from asserting his challenge, in this habeas corpus proceeding, to the exclusion of Ms. Brou because of his trial counsel's failure to object to her exclusion. I agree.

This court has recently discussed the reason why the *Sykes* bar cannot now be raised:

> First, the State did not contend in the district court that Washington's *Lockett* [438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973] claim is barred by Mississippi's contemporaneous objection rule and *Sykes*. As such, the State itself is precluded from raising at this late date any claim that Washington should be barred under a state-law theory of procedural default, for "[a]s a general principle of appellate review, this court will not consider a legal issue or theory that was not presented to the [federal district court]." *Noritake v. M/V Hellenic Champion*, 627 F.2d 724, 732 (5th Cir. 1980). *See, e.g., Smith v. Estelle*, 602 F.2d 694, 708 n. 19 (5th Cir. 1979) (State waived its *Sykes* argument by failing to raise it in the federal habeas hearing prior to its motion for a new trial), *aff'd*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); *LaRoche v. Wainwright*, 599 F.2d 722, 724 (5th Cir. 1979) (State waived its *Sykes* argument by failing to raise it in habeas proceedings in federal district court).

Washington v. Watkins, 655 F.2d 1346, 1368 (1981), *cert. denied*, — U.S. —, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982).

In this case the State has never alleged a *Wainwright v. Sykes* bar to this claim despite the following facts. Williams' trial counsel did not object to Ms. Brou's exclusion for cause; neither did his counsel argue that point in his direct appeal to the Louisiana Supreme Court. (Indeed, Williams elsewhere assigns this failure as one respect in which his trial counsel rendered constitutionally ineffective assistance.) After that court affirmed his conviction and sentence, Williams changed lawyers. The *Witherspoon* issue appears to have been raised for the first time in Williams' petition for certiorari. After the Supreme Court denied certiorari, Williams urged his *Witherspoon* grounds in a petition for post-conviction relief in the Louisiana state court in which he was convicted. The State, in response, did not argue that Williams had waived this argument; rather, it contended simply that there had been no *Witherspoon* violation. Nonetheless, in rejecting this argument when it denied Williams' requests for post-conviction relief and a stay of execution pending appeal, the state court concluded without citation of authority that "[t]his matter deals with jury selection and was or should have been considered on appeal. It is not the proper subject for post-conviction relief." When the Louisiana Supreme Court then refused to stay Williams' execution, no member of that court addressed either the waiver issue or the merits of Williams' *Witherspoon* argument, although some of the justices indicated that they thought others of Williams' arguments had some merit.

When Williams filed this action in federal district court, he again raised his *Witherspoon* argument as his first ground for habeas relief. In his initial pleading, he argued at some length, and with considerable citation of authority, that as a matter of Louisiana law, his trial counsel's failure to object to Ms. Brou's exclusion had not waived this point. In responding to his habeas petition, however, the State again did not argue waiver and *Wainwright v. Sykes*; rather, it again contended that there had been no *Witherspoon* violation. Neither did the State claim that Williams had failed to exhaust his state remedies. The district court did not mention waiver, but went directly to the merits of this claim in concluding, without any further discussion or visible analysis, that "[a] careful review of pages 83, 84, 185 and 186 of the trial transcript which sets [*sic*] forth the voir dire examination of the three jurors in question clearly shows that the mandates set forth by the United States Supreme Court in the *Witherspoon* and *Adams* decisions were strictly adhered to and followed by the trial court."

In briefing this argument for the panel, Williams again contended that as a matter of Louisiana law, his trial counsel's failure to object had not waived his *Witherspoon* claim. Again, the State made no mention whatsoever of waiver in its response, although it did quote the portions of the transcript that indicated the failure to object. The panel opinion nowhere mentions waiver, but instead adopted in full the conclusion of the district court on the merits of this issue.

The State, even in its post *en banc* brief to this court stated: "The State is not arguing that the defense should be precluded from alleging a *Witherspoon* error simply because no objection was raised at trial." Thus, there is no procedural bar to a decision, on the merits, of Williams' *Witherspoon* claim.

Finally, the Supreme Court's recent decisions in *United States v. Frady*, — U.S. —, — — —, 102 S.Ct. 1584, 1591–1595, 71 L.Ed.2d 816 (1982) (§ 2255 actions); *Engle v. Isaac*, — U.S. —, —, 102 S.Ct. 1558, 1575, 71 L.Ed.2d 783 (1982) (§ 2254 actions), dealing with *Wainwright v. Sykes* do not address a situation in which the State elects not to assert a *Wainwright v. Sykes* bar.

she did state that she could not return a death sentence. When the prosecutor inquired again to assure that she could not consider this penalty, Ms. Brou responded that she did not think she could do it. When this response is viewed in conjunction with her previous statement of clear opposition to the death penalty, the record of automatic opposition to the death penalty is established.

Thus, the majority transforms Ms. Brou's serious reservations about assessment of the death penalty in some circumstances, perhaps in the circumstances of this case, into *automatic* opposition to the death penalty regardless of any evidence developed at trial. This method of analysis is flawed; the conclusion, incorrect. Moreover, the majority's focus on *one* sentence, rather than the whole colloquy, does violence to the mandate of *Witherspoon* and its inherently cautious approach to exclusion of jurors. The proper method of analysis, it seems to me, is to examine her responses as a whole, mindful of the analysis set forth in *Witherspoon*.

The essence of that analysis is, in the words of *Witherspoon* itself, that veniremen "cannot be excluded for cause simply because they indicate that there are *some kinds* of cases in which they would refuse to recommend capital punishment;" that a "prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him;" and that a venireman may be asked "that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death *regardless of the facts and circumstances that might emerge in the course of the proceedings.*" *Witherspoon v. Illinois*, 391 U.S. at 522 n. 21, 88 S.Ct. 1770, 1777 n. 21, 20 L.Ed.2d 776 (emphasis added).

The colloquy demonstrates that Ms. Brou thought that there were *some* cases where the death penalty should be returned and some where it should be refused. ("I know there is certain cases where you read about them and they are so hideous that you just think, oh, the death penalty would be the only good outcome....") Thus, Ms. Brou, it seems to me, is the very embodiment of the venireman referred to in *Witherspoon* who cannot be excluded because she distinguishes between the types of cases in which she could recommend the death penalty from those in which she could not.[2] A juror must be permitted to say, "I am willing to consider all the facts and circumstances of this case; but if all that emerges here is a murder committed during the course of a robbery, I do not think I could recommend the death penalty." Ms. Brou said no more.

Furthermore, questions by the State to Ms. Brou, in contravention of the Supreme Court's instruction in *Witherspoon* that a prospective juror cannot be expected to say in advance of trial whether he or she would, in fact, vote for the extreme penalty in the particular case, were improper; the majority's reliance on her responses to support its finding of automatic opposition is equally so. ("Her unwillingness to do so here, however, is firm.") No juror can be expected to decide, before trial, whether this is the type of case in which the death penalty can be assessed. To require such a commitment flies in the face of the teachings of *Witherspoon*.

2. *Witherspoon* holds that a venireman may not be excluded for cause simply because he or she indicates that there are some kinds of cases in which he or she would refuse to recommend capital punishment. It seems to me that this is no less true where the class of cases in which a venireman would refuse to recommend capital punishment happens to be coextensive with a class of cases defined by one of the State's statutorily-prescribed aggravating circumstances. Specifically, if it is the case that Ms. Brou would refuse to recommend capital punishment where the only aggravating circumstance was the co-existence of a murder and a robbery, the fact that she would refuse to recommend the death penalty in one class of cases where the State would permit her to recommend it is not grounds for her exclusion as a juror. This conclusion seems to me to be mandated by the fact that in Louisiana, the statutory scheme permits a juror to refuse to recommend the death penalty even if *all* jurors have found the existence beyond a reasonable doubt of one or more aggravating circumstances which outweigh any mitigating circumstances.

Even were the questions proper, her responses were not, as the majority states, "firm." They were vacillating. ("Well, of course, I don't know that much about the case. I always think in terms of how hideous the crime is because I don't know that much about it. I don't know. I don't think I can do it.") At most, Ms. Brou's statements about the *Williams* case reflected uncertainty as to her decision because she had not been specifically apprised of the facts.[3] This circuit's precedent precludes her exclusion. *Granviel v. Estelle*, 655 F.2d 673, 678–80 (5th Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982); *Burns v. Estelle*, 626 F.2d 396, 397–98 (5th Cir. 1980) (en banc).

In summary, the majority's conclusion that the exclusion of Ms. Brou was proper cannot be justified under *Witherspoon*.

II.

Williams asserts several errors relating to two of the three aggravating circumstances found by the jury and the method by which his sentence was reviewed by the Supreme Court of Louisiana. The two challenged aggravating circumstances were: (1) the offender knowingly created a risk of death or great bodily harm to more than one person; and (2) the offense was committed in an especially heinous, atrocious, or cruel manner.[4]

3. Ms. Brou's uncertainty about the death penalty is reflected not only in the colloquy between the State and Ms. Brou quoted in the majority opinion, but also in the following exchange between Ms. Brou and the trial judge which immediately preceded the State-Brou colloquy:

> THE COURT: Do either of you know of any reason why you feel that you should not or could not serve on this jury?
>
> ....
>
> MS. BROU: Well, I'm wondering about the question of capital punishment. Does that disqualify you if you don't have a firm conviction about that?
>
> THE COURT: I'm sure that the attorney for the State will ask you that question so I will defer that until later.

The State then commenced its voir dire examination of Ms. Brou, and the prosecutor began with a statement of the purpose of his questioning. Midway through that statement, the prosecutor made clear his aversion to a juror who is unable to give him, in advance of trial, the proper assurances about what the juror's ultimate decision in the case will be.

> The State is entitled to have a juror that can say, yes, I can return a verdict requiring the death penalty, if the case is proven to me and if the aggravating circumstances are proven to me. So, if you don't know at this point and you are not able to tell me, then that doesn't really help me. Because I don't know what your decision will be down the road. So, my question is also framed in this manner.

The prosecutor then asked the question that begins the portion of the State-Brou colloquy quoted at page 6 of the majority opinion.

4. Although, as will be seen, the majority under its analysis does not have to address the question whether there was sufficient evidence to support the findings that the offender knowingly created a risk of death or great bodily harm to more than one person, and the offense was committed in an especially heinous, atrocious or cruel manner, it seems clear to me, after reviewing the record in this case and the decisions of the Supreme Court of Louisiana adopting narrowing constructions of aggravating circumstances 905.4(d) (knowing creation of risk of death or great bodily harm to more than one person) and 905.4(g) (offense committed in an especially heinous manner), that the petitioner is correct in his third claim for relief: no rational trier of fact could have found proof of either of these aggravating circumstances (as they are defined by the Louisiana Supreme Court) beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791, 61 L.Ed.2d 560 (1979). Insofar as the heinousness of the crime is concerned, the victim was shot immediately after the defendant raised his gun; he died instantly. The defendant did not torture or inflict unnecessary pain on the victim. Insofar as the knowing creation of a risk of death or great bodily harm to more than one person is concerned, the focus is on whether the defendant *contemplated* and *caused* the creation of great risk of death or of great bodily harm to more than one person. The defendant shot the security guard at point blank range and although customers were nearby in the store, it could not be found beyond a reasonable doubt that the defendant knowingly created a risk of death or great bodily harm to any of them. Two customers were hit in the foot by shot gun pellets when the defendant accidentally (to use the word employed by the majority opinion of the Louisiana Supreme Court) dropped the shotgun and the gun discharged when it hit the floor. Clearly the defendant did not *contemplate* injury to anyone when he dropped the gun. *See State v. Monroe*, 397 So.2d 1258 (La.1981); *State v. Culberth*, 390 So.2d 847 (La.1980); *State v. English*, 367 So.2d 815 (La.1979).

A. What Has the Majority Opinion Held?

Part II of the majority opinion begins by setting forth Williams' claim that his death sentence is violative of the due process clause of the fourteenth amendment because of the insufficiency of the evidence to support two of the three aggravating circumstances found by the jury. The opinion then focuses on whether the two challenged aggravating circumstances suffer constitutional defects under *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). It holds that, because the Louisiana Supreme Court did not review the two challenged circumstances, it cannot be said to have adopted an unconstitutionally broad construction of them in violation of *Gregg* and *Godfrey*. This facile distinction between what might be called an act of commission (*Godfrey*) and an act of omission (*Williams*) misses the point of *Gregg* and *Godfrey*. The issue which *Gregg* and *Godfrey* present for *Williams* is whether appellate affirmance of a death penalty based in part on jury findings of two aggravating circumstances that are the product of unchanneled and open-ended constructions of those circumstances can constitutionally be sustained.

The majority turns to the issue whether the jury's sentencing discretion was properly channeled.[5] The majority begins by distinguishing *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), *cert. granted sub nom. Zant v. Stephens*, 454 U.S. 814, 102 S.Ct. 90, 70 L.Ed.2d 82 (1981), certifying a question of state law to the Supreme Court of Georgia, *sub nom. Zant v. Stevens*, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), on the ground that in *Stephens* the unconstitutionally vague aggravating circumstance found by the jury was one that required the jury to assess the import of facts and circumstances not before the jury as a part of the proof of the crime, whereas in this case, the jury had only to weigh the facts of the crime itself in arriving at its decision. The former requires proper jury guidance per *Stephens*. The majority states that the latter does not, citing no authority. The presence of a properly found aggravating circumstance cannot be used to distinguish the two cases because such a circumstance existed in each of them. The majority then goes on to assess the impact of the two potentially flawed

5. The majority states that Williams' attorney waived, at the *en banc* oral argument, Williams' ground six: the failure of the trial court to instruct the jurors on the proper scope of the statutory aggravating circumstances obviated the constitutionally required "guided discretion" that is a hedge against the arbitrary and capricious imposition of a death sentence.

I question the propriety of a claim of waiver at oral argument where there is no official transcript of the proceeding. In any event, a review of the oral argument tape indicates that the attorney made no such waiver:

THE COURT: Do I understand you to tell us that the trial judge errs when he reads to the jury the articles or sections of the code or statute involved and said this is the law in this area. Now you apply what evidence you heard ... to the extent it fits this law and give us a decision. If he speaks to one thing, its an aggravating circumstance for which there was no evidence entered that that's a tainted jury?

COUNSEL: I submit, your honor, that that's an issue that's unresolved in Louisiana, but I do think that if the trial judge submits erroneous aggravating—the jury returns erroneous aggravating circumstances even though the trial judge may properly submit a list, the jury returns an erroneous aggravating circumstance indicating that it considered that factor in reaching a sentencing decision. That's where the error rises.

THE COURT: That's different from him taking the article and reading 905 and says here's what the law says?

COUNSEL: I submit, I misspoke before, your honor. I think that its the juror's return of the aggravating circumstance indicating that it took that improper factor into account when it returned the death sentence. That is the error.

It is clear that the attorney was distinguishing a jury's *consideration* of aggravating circumstances as grounds for error from a jury's *finding* of aggravating circumstances as grounds for error. The question to which the attorney responded was not whether the trial judge erred in failing to give instructions which limited the application of each of the aggravating circumstances contained in any list read to the jury. Additionally, the attorney specifically reiterated this ground number six in his post *en banc* argument supplemental brief. There was no waiver.

aggravating circumstances found by the jury. Those circumstances are described as going to the gravity of Williams' crime and as material to deciding whether the aggravating and mitigating circumstances weighed together indicate that the death penalty should be imposed. I agree. Why, then, since the jury may have assigned a degree of gravity or weight to Williams' crime that was erroneous under Louisiana law, are we not compelled to vacate his sentence? Because, according to the majority opinion, the jury assigned that weight simply by "review[ing] the facts they properly knew. The jury necessarily focused on what Williams had done, not on how Louisiana classified his actions, since they were not instructed on the legal meaning of the terms involved." The majority tells us that the very absence of adequate, narrowing instructions on the two challenged aggravating circumstances means that the jury did not in fact *classify* Williams' actions in the manner contemplated by Louisiana law. They couldn't have done so, because they weren't told *how* to do it. This analysis of what the jury did cannot be squared with the facts. The only hard evidence we have of what the jury did is the Jury Recommendation, signed by the foreman and delivered to the court, all as required by Louisiana law.[6] It is set forth in full below:

JURY RECOMMENDATION

Filed April 19, 1979

Article 905.7 Form of recommendations

Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

Article 905.4

The offender was engaged in the prepetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery.

The offender knowingly created a risk of death or great bodily harm to more than one person.

The offense was committed in an especially heinous, atrocious or cruel manner.

s/ Claude H. Sims, Jr.
Foreman
April 19, 1979

or

The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

s/ _____
Foreman

The portion of the Recommendation beginning with "Article 905.4 . . ." through the signature of the foreman is written in the handwriting of the foreman. The jury clearly thought they were finding the existence of three aggravating circumstances set forth in Article 905.4, as they were instructed to do. Though they were not required to do so, they carefully gave the court a statutory reference for good measure. The jury did focus on how Louisiana classified Williams' actions, albeit wrongly in the case of two of the aggravating circumstances.[7] As we shall see below, there is simply no way to tell whether the jury's mistaken *classification* of Williams' actions changed the weights the jury assigned in its balancing of aggravating and mitigating circumstances. The majority, however, focuses on what *it* declares to be "the meaningful portions of this verdict, (1) that at least one aggravating circumstance was present and (2) that under the totality of aggravating and

6. I note that the Jury Recommendation is in the form specified by La.Code Crim.Proc.Ann. art. 905.7 (West 1976), which *requires* the jury to list all the statutory aggravating circumstances that they find. Article 905.7 is doubtless constructed to facilitate the appellate review contemplated by *Gregg v. Georgia*, 428 U.S. at 195, 96 S.Ct. at 2935 ("Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.").

7. See note 4, *supra*.

mitigating circumstances the death penalty should be imposed." But why are judges qualified to say what were the meaningful portions of the Recommendation insofar as the members of the jury were concerned? Furthermore, as will also be developed below, the notion that once having found one valid aggravating circumstance, the jury should be and is permitted to evaluate the circumstances of the offense free of guided or channeled discretion ignores the requirements of capital sentencing law as it has developed during the last ten years.

The majority then moves on to announce a new principle of habeas review. The majority states: "The aggravating circumstances which were not considered and limited by the appellate court do not serve as the basis for the death sentence." Although it is somewhat unclear, what the majority appears to be saying is that, under Louisiana law (no citations provided), the aggravating circumstances not reviewed by the Louisiana Supreme Court "do not serve as the basis for the death sentence." The majority then goes on to say "[w]e base the sentence" on the one circumstance which that court did review. Since we are not assessing the sentence, what the majority must be saying is that this court, in reviewing the constitutionality of the petitioner's sentence under 28 U.S.C. § 2254, will review only the aggravating circumstance reviewed by the Louisiana Supreme Court. The majority cites as support for this method of habeas review three Supreme Court cases in each of which certiorari was granted to review the decision of the supreme court of a state affirming a conviction and sentence on direct appeal—*Gregg v. Georgia*, *supra*, *Godfrey v. Georgia*, *supra*, and *Eddings v. Oklahoma*, —— U.S. ——, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). The cases cited by the majority do not support the majority's rule of habeas review, nor do they support a similar rule of appellate review. The text accompanying note 53 to the Supreme Court's opinion in *Gregg v. Georgia*, 428 U.S. at 200, 96 S.Ct. at 2938, is addressed simply to the construction placed by the Supreme Court of Georgia on the (b)(7) aggravating circumstance—that the offense was "outrageously or wantonly vile, horrible and inhuman." The Supreme Court addressed in the text the one reported case in which the Supreme Court of Georgia had affirmed a death sentence based solely on a (b)(7) finding and noted that it was a horrifying torture-murder. Note 53 to the opinion canvasses the only two other reported cases of sentences based in whole or in part on (b)(7) and notes that the Supreme Court of Georgia did not contribute to the gloss on (b)(7) in those cases because it did not rely on (b)(7) when it upheld the death sentences. There is no discussion or analysis in note 53 of the propriety of this method of appellate review; that was not the focus of the note.

In *Godfrey v. Georgia*, *supra*, the Supreme Court vacated a death sentence based solely on (b)(7). It had no occasion in *Godfrey* itself to consider the method of appellate review of a sentence based on multiple aggravating circumstances.

In *Eddings v. Oklahoma*, *supra*, the Supreme Court vacated a death sentence because it found that the Oklahoma trial court and Court of Criminal Appeals placed limitations on the mitigating evidence they would consider in violation of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Having done so, it had no occasion to consider the method of appellate review of a sentence based on multiple aggravating circumstances. To the extent that any conclusion can be drawn from notes 3 and 4 (*Eddings v. Oklahoma*, —— U.S. at —— nn. 3 & 4, 102 S.Ct. at 873 nn. 3 & 4) to the Supreme Court's opinion in *Eddings* about the Court's position on appellate review, it seems to me that the Court is suggesting that the trial court on resentencing should reconsider its "heinous, atrocious or cruel" finding; it is noteworthy that reconsideration is suggested in a case in which there were two other aggravating circumstances found by the sentencing judge.

B. What is the Import of Zant v. Stephens?

The majority does not address or even advert to the Supreme Court's opinion in

Zant v. Stephens, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982). It is clear from the manner in which the Court defined the question posed to it in *Zant* that *Williams* cannot be distinguished on the basis that the *Zant* jury had to assess the import of facts and circumstances not before the jury as part of the proof of the crime, whereas in *Williams*, the jury had to weigh only the facts of the crime itself.[8] The question was defined in *Zant* as: "whether a reviewing court constitutionally may sustain a death sentence as long as at least one of a plurality of statutory aggravating circumstances found by the jury is valid and supported by the evidence." *Id.* — U.S. at —, 102 S.Ct. at 1858 (emphasis added). The Georgia Supreme Court had consistently stated that it could constitutionally sustain a death sentence in those circumstances. *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349, 353 (1979), *cert. denied*, 445 U.S. 938, 100 S.Ct. 1332, 63 L.Ed.2d 772 (1980). The Court stated that the Georgia Supreme Court had never articulated the state law premise for that conclusion. *Zant v. Stephens*, — U.S. at —, 102 S.Ct. at 1858. Such articulation, according to the Court, would be relevant to its analysis of the case. *Id.* — U.S. at —, 102 S.Ct. at 1859.

The Court then suggested several possible bases for the Georgia rule.[9]

> It may be that implicit in the rule is a determination that multiple findings of statutory aggravating circumstances are superfluous, or a determination that the reviewing court may assume the role of the jury when the sentencing jury recommended the death penalty under legally erroneous instructions. In this Court, the Georgia Attorney General offered as his understanding the following construction of state law: The jury must first find whether one or more statutory aggravat-

8. The majority opinion appears to distinguish *Stephens* on the ground that the flawed aggravating circumstance in *Stephens* was "facially unconstitutional," whereas the two challenged aggravating circumstances in *Williams* are not facially unconstitutional per *Gregg* but are only alleged to be unconstitutional as applied. I fail to see why that distinction makes any sense at all, and no explanation is offered by the majority. As Justice Dennis said, dissenting in *State v. Monroe*, 397 So.2d 1258, 1281: "A verdict based upon evidence insufficient for a finding beyond a reasonable doubt is just as unconstitutional as one based on a facially unconstitutional statute. *Jackson v. Virginia*, 443 U.S. 307 [,314, 320-24], 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)."

9. The different assumptions held by members of the Supreme Court as to the meaning and constitutionality of the Georgia Supreme Court's position were illustrated in the Court's opinion in *Zant*.

In *Drake v. Zant*, 449 U.S. 999, 101 S.Ct. 541, 66 L.Ed.2d 297 (1980), the Court declined to grant certiorari and vacate the judgments in two Georgia cases in which the death sentences—premised in part on the (b)(7) aggravating circumstance—were imposed prior to our decision in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Justice Stevens, concurring in the disposition, expressed the opinion that the Georgia Supreme Court's position was so clear that there was no need to remand the cases for reconsideration in light of *Godfrey*. *Id.*, at 1000, 101 S.Ct. at 542. Dissenting from the denial of certiorari, Justice Stewart stated that if one aggravating circumstance found by the jury "could not constitutionally justify the death sentence, Georgia law would prohibit a further finding that the error was harmless simply because of the existence of the other aggravating circumstance." *Id.*, at 1001, 101 S.Ct. at 542. He believed that the Georgia Supreme Court's position on the issue was inconsistent with the Georgia capital punishment scheme because "only the trial judge or jury can know and determine what to do when upon appellate review it has been concluded that a particular aggravating circumstance should not have been considered in sentencing the defendant to death." *Ibid.* JUSTICE WHITE, also dissenting, would have remanded for reconsideration in light of *Godfrey*, a disposition that "would allow the Georgia Supreme Court in the first instance to determine whether the death penalty should be sustained without regard to the validity of the *Godfrey* circumstance." *Id.*, at 1002, 101 S.Ct. at 543. He did "not understand the Georgia cases ... to hold either that the Georgia Supreme Court is without power to set aside a death penalty if it sustains only one of the aggravating circumstances found by the jury or that, although the court has that power, it invariably will not disturb the death penalty in such situations." *Ibid.*

Zant v. Stephens, — U.S. at —, n.2, 102 S.Ct. at 1857 n.2.

ing circumstances have been established beyond a reasonable doubt. The existence of one or more aggravating circumstances is a threshold finding that authorizes the jury to consider imposing the death penalty; it serves as a bridge that takes the jury from the general class of all murders to the narrower class of offenses the state legislature has determined warrant the death penalty. After making the finding that the death penalty is a possible punishment, the jury then makes a separate finding whether the death penalty should be imposed. It bases this finding "not upon the statutory aggravating circumstances but upon all the evidence before the jury in aggravation and mitigation of punishment which ha[s] been introduced at both phases of the trial."

Zant v. Stephens, — U.S. at —, 102 S.Ct. at 1858.

The Court concluded:

> In view of the foregoing uncertainty, it would be premature to decide whether such determinations, or any of the others we might conceive as a basis for the Georgia Supreme Court's position, might undermine the confidence we expressed in *Gregg v. Georgia, supra*, that the Georgia capital-sentencing system, as we understood it then, would avoid the arbitrary and capricious imposition of the death penalty and would otherwise pass constitutional muster.

Id. — U.S. at —, 102 S.Ct. at 1859.

The Court then certified the following question to the Supreme Court of Georgia.

> What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury.

Id. — U.S. at —, 102 S.Ct. at 1859.

In view of the importance of the state-law premises for the Georgia Supreme Court's rule to the constitutional issue in *Zant* and the resulting decision of the Supreme Court to certify to the Georgia Supreme Court an inquiry into those premises, we must in *Williams* consider what the Louisiana rule is and what the state-law premises for that rule are.

The Louisiana Supreme Court has apparently borrowed the Georgia Supreme Court's rule on aggravating circumstances.

> At the present we know of no constitutional requirement that a death sentence be vacated whenever the jury errs in its finding of a statutory aggravating circumstance. We note that the Georgia legislature has directed the Georgia Supreme Court to determine whether "the evidence supports the jury's or judge's finding of a statutory aggravating circumstance ...," Ga.Code Ann. § 27-2537(e) (emphasis added), and that this provision was quoted with approval in *Gregg v. Georgia*, supra. As stated by the Georgia Supreme Court in *Gates v. State*, 244 Ga. 587, 599, 261 S.E.2d 349, 358 (1979):
>
> > "Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon. *Gregg v. State*, 233 Ga. 117, 127-128, 210 S.E.2d 659 (1974); *Gregg v. Georgia*, supra, 428 U.S. [153] at 161, 162 [96 S.Ct. 2909 at 2919-2920, 49 L.Ed.2d 859] ... The erroneous application of the statutory aggravating circumstance of 'depravity of mind to the victim' ... does not invalidate the valid parts of the verdict of the jury."

State v. Monroe, 397 So.2d 1258, 1276 (La. 1981). The Louisiana court has restated this rule in the context of review of death sentences.

> [I]f the jury finds more than one statutory aggravating circumstance and one is clearly supported by the record, it is unnecessary to overturn the sentence because one (or more) of the additional statutory aggravating circumstances are not supported. *State v. Monroe*, 397 So.2d 1258 (La.1981); *State v. Williams*, 383 So.2d 369 (La.1980), *cert. denied*, 449 U.S. 1103, 101 S.Ct. 899 [66 L.Ed.2d 828];

State v. Martin, 376 So.2d 300 (La.1979), *cert. denied*, 449 U.S. 998, 101 S.Ct. 540 [66 L.Ed.2d 297].

The jury properly found that at least one statutory aggravating circumstance existed, that is, defendant was engaged in the perpetration of armed robbery when the victim was murdered; *therefore, we consider it unnecessary to inquire whether the jury correctly found that the other aggravating circumstances existed.*

State v. Mattheson, 407 So.2d 1150 at 1166 (La.1981) (emphasis added).

The citation in *Monroe* to the Georgia rule as construed in *Gates* and the Louisiana Supreme Court's own restatement of that rule in *Mattheson* demonstrate that Louisiana has adopted the Georgia rule. This is not surprising considering that Louisiana had previously adopted, in large part, the Georgia capital sentencing procedure. "The Georgia sentencing scheme ... serves as a model for our sentencing procedure (C.Cr.P. 905–905.9)." *State v. Culberth*, 390 So.2d 847, 849 (La.1980). *Compare* La.Code Crim.Proc.Ann. art. §§ 905.4, 905.5 (West 1976) and Rule 28, La. Supreme Court Rules, *with* Ga.Code Ann. § 27–2534.1 (Supp.1975).

But while the Louisiana Supreme Court has adopted the same rule as the Georgia Supreme Court, it has provided us with no more guidance as to the state law premises for that rule than the Georgia Supreme Court has provided. The majority has itself supplied a number of what must be classified as state-law premises for the Louisiana rule, without benefit of a single citation to Louisiana law. We have no warrant to do for Louisiana what the Supreme Court has refused to do for Georgia. If the majority has correctly disposed of the *Witherspoon* issue (which I doubt, see Part I, *supra*), then we are compelled by *Zant* to certify to the Louisiana Supreme Court [10] the same question as the United States Supreme Court certified to the Georgia Supreme Court. I dissent from the implicit decision of the majority not to do that.

C. *What Are the Implications of Zant for Our Habeas Review?*

Zant involves more than a procedural detour to permit the state court to fill in the rationale for its action. Instead, the reason for the certification appears to be the Court's concern both with the way in which under Georgia law the jury arrives at a decision to assess the death penalty and with the function of the Georgia Supreme Court in reviewing the sentence.[11] Williams relies on both as grounds for habeas relief. The dual prongs of the Supreme Court's inquiry stem, at least in part, from the jury-appellate review process contemplated by *Gregg v. Georgia*, *supra*. In *Gregg*, the opinion of Justices Stewart, Powell and Stevens asserts that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." 428 U.S. at 188, 96 S.Ct. at 2932. That opinion goes on to say:

> *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of

10. The Louisiana certification rule provides:

> When it appears to the Supreme Court of the United States, or to any circuit court of appeal of the United States, that there are involved in any proceedings before it questions or propositions of law of this state which are determinative of said cause independently of any other questions involved in said case and that there are no clear controlling precedents in the decisions of the supreme court of this state, such federal court before rendering a decision may certify such questions or propositions of law of this state to the Supreme Court of Louisiana for rendition of a judgment or opinion concerning such questions or propositions of Louisiana law. This court may, in its discretion, decline to answer the questions certified to it.
>
> The provisions of this rule may be invoked by the Supreme Court of the United States or any circuit court of appeal of the United States upon its own motion or upon the suggestion or motion of any interested party.

Louisiana Supreme Court Rule 12 (West 1961).

11. Presumably since *Zant* is a habeas case, the Court will also be concerned with the role of a habeas court in reviewing the constitutionality of Stephens' sentence.

> whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Id. at 189, 96 S.Ct. at 2932. The opinion declares that a carefully drafted statute pointing to the main circumstances of aggravation and mitigation that should be weighed and weighed against each other provides guidance to the sentencing authority and reduces the likelihood that the sentencing authority will impose a sentence that is capricious or arbitrary. The opinion of Justice White in *Gregg*, concurred in by The Chief Justice and Justice Rehnquist, also placed strong emphasis on the role of statutory aggravating circumstances in limiting jury discretion. *Gregg v. Georgia*, 428 U.S. at 222, 96 S.Ct. at 2947. A majority of the Court, therefore, emphasizes the critical importance of channeling jury discretion, *i.e.*, of providing the jury with standards to guide its use of the information relevant to the imposition of sentence. *Id.* at 195, 96 S.Ct. at 2935. Finally, the opinion of Justices Stewart, Powell and Stevens also emphasizes the "further safeguard of meaningful appellate review" of "the factors [the jury] relied upon in reaching its decision" as a further safeguard against the arbitrary or capricious imposition of the death penalty. *Id.* (emphasis added). In Georgia (as in Louisiana, see note 6, *supra*), the jury is required by statute to list those factors, thereby facilitating appellate review.[12]

Within that general framework of guided jury discretion and meaningful appellate review, the opinion of Justices Stewart, Powell and Stevens in *Gregg* then addresses specifically the claim that the aggravating circumstance there involved (the offense was "outrageously or wantonly vile, horrible and inhuman") was so broad and vague as to leave juries free to act as arbitrarily and capriciously as they wish in deciding whether to impose the death penalty. The opinion agrees that it is arguable that this circumstance could be found in any murder, but concludes that there is no reason to assume that the Supreme Court of Georgia would adopt such an open-ended construction. By looking to the Supreme Court of Georgia to weed out those cases in which an overly broad construction of the aggravating circumstance is applied by the jury, the opinion again made "meaningful appellate review" an integral part of the constitutionality of the death penalty provided for in the Georgia sentencing scheme. This critical function of appellate review may help to explain why it is that the Court has thus far declined to adopt Justice Marshall's position, as expressed in his concurring opinion in *Godfrey v. Georgia*, 446 U.S. at 436–37, 100 S.Ct. at 1769, that the jury instructions must themselves include the narrowing construction of potentially overbroad aggravating circumstances. It seems to me, therefore, that a habeas court assessing the constitutionality of a death sentence imposed under a statutory scheme such as either of the Georgia-Louisiana twins must review both the degree to which the jury's discretion was suitably channeled and the

12. While the Court in *Gregg* did not specifically address the issue presented in *Zant* and *Williams*, since that issue ("nuance," per *Zant*) was not presented in *Gregg*, it seems to me that the explicit reference in the opinion of Justices Stewart, Powell and Stevens (*Gregg*, 428 U.S. at 195, 96 S.Ct. at 2935) to the existence of meaningful appellate review of the factors relied upon by the jury in reaching its decision and specified by the jury in its Recommendation suggests that those Justices may have thought that the Georgia Supreme Court would, as a matter of state law, not to mention generally accepted principles of appellate review, review all those factors and vacate the sentence if any was unsupportable. In *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349, 358 (1979), *cert. denied*, 445 U.S. 938, 100 S.Ct. 1332, 63 L.Ed.2d 772 (1980), the Georgia court has declined *as a matter of state law* to do that, just as in *Monroe v. State*, 397 So.2d 1258, 1276 (La.1981), the Louisiana Supreme Court has declined *as a matter of state law* both to review all the factors relied on and to vacate the sentence if any is unsupportable. In *Zant*, the Court is asking, *inter alia*, for a more explicit statement of the principles of appellate review followed by the Georgia court. Depending upon what the Georgia court comes up with, the Court has indicated that it may have to reassess the constitutionality of the Georgia statute, at least as applied to multiple aggravating circumstances cases.

meaningfulness of the appellate review of that sentence.

D. Was the Jury's Discretion Channeled?

The Louisiana legislature paid careful heed to *Gregg* and its companion cases. The statutory scheme lists nine aggravating circumstances directed to the circumstances of the offense and the character and propensities of the offender. The jury is permitted to consider only the nine aggravating circumstances listed. As noted above, the jury is required to make its recommendation on a statutorily prescribed form which calls for the jury to list the aggravating circumstances which it finds, thereby facilitating review by the Supreme Court of Louisiana, which is mandated to review every sentence of death to determine if it is excessive.

Insofar as channeled jury discretion is concerned, the majority opinion holds that in Louisiana the jury had only to find the existence of one valid statutory aggravating circumstance, under properly channeled discretion, to impose the death penalty. Having done so, the jury is thereafter free to consider the circumstances of the crime (but not facts not before the jury as a part of the proof of the crime) free of any "standards to guide its use of that information." *Gregg v. Georgia*, 428 U.S. at 195, 96 S.Ct. at 2935. Let us consider what that means in this case. The jury found the existence in this case of two aggravating circumstances—the offender knowingly created a risk of death or great bodily harm to more than one person, and the offense was committed in an especially heinous, atrocious, or cruel manner—that would not qualify as statutory aggravating circumstances as the Louisiana Supreme Court has construed them. What that means is that the list of the aggravating circumstances which the jury was permitted to consider was increased in this case to eleven, having been augmented by two circumstances that would not qualify as statutory aggravating circumstances. This flies in the teeth of the Louisiana statute which limits the jury to consideration of the nine aggravating circumstances listed in the statute. Conspicuously missing from Article 905.4, which lists the statutory aggravating circumstances, is the language found in Article 905.5(h)—"Any other relevant mitigating circumstance"—which is commonly viewed as giving the jury broad discretion to consider mitigating circumstances that might not qualify under the balance of 905.5. *Lockett v. Ohio*, 436 U.S. at 605, 98 S.Ct. at 2965. The majority's interpretation also means that the same behavior that would not support a finding of a statutory aggravating circumstance (and therefore the death penalty) if it were the only potential aggravating circumstance in the case *will* support a finding of a nonstatutory aggravating circumstance (and therefore contribute to the death penalty) if there is another validly found statutory aggravating circumstance in the case. None of this finds *any* support in Louisiana law, and if it accurately describes the process by which Williams' sentence was assessed, that fact alone may constitute a denial of due process. In any event, this process lacks the specific guidance of jury discretion in evaluating the circumstances of the crime mandated by *Gregg*.

E. Is Louisiana Appellate Review "Meaningful?"

As noted above, key to analysis of the constitutionality of Williams' sentence is the question whether that sentence received meaningful appellate review. The Louisiana Supreme Court considered only whether the first aggravating circumstance was properly found and refused to review the other two under the court's rule that, even if the other two were unsupported by the evidence, the sentence would be affirmed. This procedure must be premised on the proposition that as a matter of law the jury's finding of the other two aggravating circumstances did not affect the jury's decision to recommend the death penalty. On this point, the reasoning of our decision in *Stephens*, as derived from *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed.2d 1117 (1931), is helpful to a determination of the adequacy of appellate review.

Stephens v. Zant, 631 F.2d at 406. How can a reviewing appellate court know the degree to which improper aggravating circumstances interacted with the proper aggravating circumstance and affected the jury decision to impose death? *Id.* As Justice Dennis of the Louisiana Supreme Court stated in reviewing a case similar to the one before us:

> On this record, if the jury believed the state's evidence, defendant's death sentence could constitutionally have rested on a finding that he was engaged in aggravated burglary, or that he knowingly created a risk of death or great bodily harm to more than one person. Since the finding of an aggravating circumstance is a necessary ground for, but does not require, the death penalty, however, it is impossible to say whether these grounds alone were the basis for the verdict. On the contrary, so far as we can tell, it is equally likely that the jury would have recommended life imprisonment if it had not thought that the defendant was guilty of killing in an especially heinous, atrocious or cruel manner.

Several United States Supreme Court decisions have clear and forceful application here. In *Bachellar v. Maryland*, 397 U.S. 564, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957); *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), the high court held that a criminal conviction must be reversed if the jury could have based the verdict on an unconstitutional statutory ground, even though there were other valid statutory grounds which the jury in fact may have employed. In those cases, since the defendants' convictions "*may* have rested on an unconstitutional ground," [emphasis added] *Bachellar v. Maryland, supra*, 397 U.S. at 571, 90 S.Ct. at 1316, they were set aside.

> ....
>
> A verdict based upon evidence insufficient for a finding beyond a reasonable doubt is just as unconstitutional as one based on a facially unconstitutional statute. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

State v. Monroe, 397 So.2d at 1281 (La.1981) (Dennis, J., dissenting).

In the case before us, it was impossible for the Louisiana Supreme Court, just as it is impossible for this court, to determine satisfactorily that the verdict was not affected by the jury's *mistaken* impression that this crime qualified under Article 905.4 (which the jury cited as authority for its Recommendation) as especially heinous, atrocious or cruel and that Williams' actions had presented the threat of death or great bodily harm to more than one person.

The majority seems to believe that, because "[t]he extra findings went to the gravity of his crime, not to the jury's *power* to impose the death penalty," the invalid aggravating circumstances had no impermissible effect on the jury's decision to recommend the death penalty. I submit that it is precisely the evaluation of the gravity of a crime which is the Supreme Court-mandated basis for *any* jury's decision to assess the death penalty. If the jury holds an erroneous impression of the gravity of the crime, its discretion may not be effectively channeled as commanded by *Gregg* and its progeny, nor can a reviewing court *know* how that misconception affected its decision.

As Justice Dennis so succinctly reasoned in *State v. Monroe, supra*:

> Moreover, I do not see how it rationally may be contended that a jury which erroneously believes it has legally found *three* aggravating circumstances to exist will not be more apt to recommend that the defendant be sentenced to death than a jury which correctly believes that the defendant is guilty of a crime involving two aggravating circumstances. To think otherwise is to ignore the realities of a capital sentencing hearing.... [I]t is highly unrealistic and purely artificial to think that a jury which believes *three* aggravating circumstances exist will not be more likely to impose a death penalty

than a jury which finds only [one]. Ordinary citizen jurors are likely to be led to the common sense conclusion that, if a defendant can be put to death for a murder involving just one aggravating circumstance found to exist the more likely it is that any mitigating circumstances are outweighed and that the death penalty is appropriate.

Id. at 1281–82 (Dennis, J., dissenting). Furthermore, Justice Stewart has echoed Justice Dennis' dissent in his dissent to the denial of certiorari in *Martin v. Louisiana*:

The Louisiana jury that imposed the death penalty upon the petitioner found two aggravating circumstances: (1) the petitioner had knowingly created a risk of death or great bodily harm to more than one person; and (2) he had committed the offense in an especially heinous, atrocious, or cruel manner. 376 So.2d 300, 311–312. In affirming the death sentence, the Louisiana Supreme Court held that the jury had properly found the first aggravating circumstance. *Id.*, at 312. It then reasoned that since the jury had the power to sentence the petitioner to death on the basis of a single aggravating circumstance, there was no need for it to review the correctness of the jury's finding of the second aggravating circumstance. *Ibid.*

Under the state death penalty statute, however, while the jury was permitted to impose capital punishment where it found only a single aggravating circumstance, it was not required to do so. La.Code Crim. Proc.Ann., Art. 905.3 (West Supp. 1980). The Louisiana court's reasoning, therefore, ignores the possibility that some of the jurors may have voted for the death sentence because of the existence of the second aggravating circumstance alone, or that others may have voted for the death penalty only because of the existence of the two aggravating circumstances.

The jury's verdict thus makes it impossible to determine whether some or all of the jurors may have relied on the existence of the second aggravating circumstance in reaching their decision to impose the sentence of death.

Martin v. Louisiana, 449 U.S. 998, 998–99, 101 S.Ct. 540, 541, 66 L.Ed.2d 297 (1980) (Stewart, J., dissenting from denial of certiorari).

Since the Louisiana Supreme Court could not hold that, as a matter of law, the challenged aggravating circumstances did not affect William's sentence, the failure of the Louisiana court to review those circumstances did not constitute the meaningful appellate review of the sentence that is critical to the constitutionality under the eighth and fourteenth amendments of Williams' sentence. If the majority is free under *Zant* to pass on the constitutionality of Williams' sentence at this point, which I doubt, then I dissent from the refusal of the majority to hold that sentence unconstitutional.

III.

While I concur with the majority in its holding that Williams did not suffer ineffective assistance of counsel at the guilt or sentencing stage, I am constrained to disagree with one aspect of the majority's reasoning as to the claim of ineffective assistance of counsel at the sentencing phase.

One of Williams' claims of error was that his counsel failed to request limiting instructions on the statutory aggravating circumstances that were considered by the jury. The majority reasons that, because counsel stated the limitations *in his argument to the jury*, he mitigated any failure of the trial court to give limiting instructions. Suppose the jury instructions had left out an element of the crime, and Williams' lawyer failed to object. Is it now to be the law in this circuit that, if his lawyer told the jury that they needed to find that element in order to convict, he effectively mitigated the failure of the trial court to give the necessary instruction and he was therefore not ineffective?

I would, instead, hold that there was no need for an evidentiary hearing on the question because the apposite United States Supreme Court and Louisiana Supreme

Court law did not, in 1976, require the trial court to give any limiting instructions. As recently as three months prior to Williams' trial, the Louisiana Supreme Court, in *State v. English*, 367 So.2d 815, 823–24 (La.1979), gave its construction of the limitations on the aggravating circumstances before us (heinous, atrocious and cruel and risk of harm to more than one person). That court, however, did not explicitly find error in the trial court's failure to give limiting instructions nor did it establish the requirement that it do so.

Additionally, as set out in Part II above, the United States Supreme Court has never mandated that limiting instructions be given to the jury, but has implicitly adopted the position that it is in appellate review that limitation of aggravating circumstances is to be accomplished. Thus, under the analysis developed by this court, the failure of the district court to grant Williams an evidentiary hearing was not error. There were no facts which could be developed at such a hearing that would have aided Williams' case.

IV.

Finally, the majority gives little attention to Williams' other grounds. One of Williams' main claims throughout his appeal is that no federal court has in this habeas corpus action addressed all his grounds for relief. I believe, in any habeas case, but especially in a capital case, each ground affecting the granting or denial of relief should be addressed. Thus I summarize the claims I have addressed or in which I concur with the majority:

Ground # 1 (*Witherspoon*)—a basis for reversal

Ground # 2 (ineffective counsel—sentencing phase)—I concur with the majority's conclusion, though in one case for a different reason

Grounds # 3–6 (errors relating to findings of invalid aggravating circumstances)—bases for reversal

Ground # 8 (failure to review on district basis)—I concur

Ground # 13 (ineffective counsel—guilt phase)—I concur

This leaves grounds seven, ten and eleven. While Williams was entitled to a district court determination of these grounds, he has not briefed these issues to this court. Thus, I believe findings as to these grounds are inappropriate.[13]

REAVLEY, Circuit Judge, concurring in part:

I concur in Parts I, II B and III of Judge Randall's opinion.

James L. CHIASSON, Plaintiff-Appellee,

v.

ROGERS TERMINAL AND SHIPPING CORPORATION and Northwestern National Insurance Company, Defendants-Appellants.

No. 80–4005.

United States Court of Appeals, Fifth Circuit.

June 28, 1982.

Longshoreman, whose back was injured while he was working aboard a vessel that was being loaded with grain, brought suit for damages against his employer. The United States District Court for the Middle District of Louisiana, Frank J. Polozola, J., entered judgment in favor of the longshoreman, and the employer appealed. The Court of Appeals, Brown, Circuit Judge, held that evidence supported the jury's finding that the longshoreman, whose injuries resulted when his employer's elevator barge, that functioned as intermediary be-

13. The Louisiana Supreme Court determined there was no error as to claims nine and twelve. The majority agreed with the state court determination. I concur.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
AUG 12 1982
GILBERT F. GANUCHEAU
CLERK

No. 81-3159

ROBERT WAYNE WILLIAMS,

Petitioner-Appellant,

versus

ROSS MAGGIO, Warden,
Louisiana State Penitentiary,
and WILLIAM J. GUSTE, Attorney
General of the State of
Louisiana,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana

ON PETITION FOR REHEARING

(August 12, 1982)

Before CLARK, Chief Judge, BROWN, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, JOHNSON, WILLIAMS, GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

Charles Clark

Charles Clark
Chief Judge

*Judge Tate did not participate in the consideration or decision of this case. Judge Garza, who was a member of the court at the time of the original decision, took senior status prior to the entry of this order on petition for rehearing. Judges Jolly and Higginbotham did not participate in the consideration or decision of this order on petition for rehearing.

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

connection with a motion to compel discovery.

[4] A reading of the Rule leads to the inescapable conclusion that the award of expenses is mandatory against a party whose conduct necessitated a motion to compel discovery, and/or against the attorney who advised such conduct, "unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." Fed.R.Civ.P. 37(a)(4). After reviewing this record we cannot say that the magistrate's findings that appellants were not substantially justified in their opposition to the union's motion to compel discovery, or that the circumstances do not make the award of expenses unjust, are clearly erroneous or contrary to law.[14]

[5] Moreover, although appellants make numerous contentions as to the impropriety of the magistrate's order of April 23, 1979, which partially granted and partially denied the union's motion to compel discovery and which found that appellants lacked substantial justification in opposing the motion, they neither appealed this order to the district court nor appealed the final dismissal of the suit, asserting error in the April 23 order as a ground for relief. Therefore, appellants have waived any arguments relating to the correctness of the magistrate's rulings in the April 23 order. *See United States v. Lewis*, 621 F.2d 1382, 1386 (5th Cir. 1980); *John B. Hull, Inc. v. Waterbury Petroleum*, 588 F.2d 24, 29–30 (2d Cir. 1978), *cert. denied*, 440 U.S. 960, 99 S.Ct. 1502, 59 L.Ed.2d 773 (1979).

[6] Finally, the named plaintiffs in the suit seek to avoid liability for the defendant-union's expenses and attorney's fees in connection with the motion to compel discovery by shifting the blame for failure to answer the interrogatories to their two attorneys, Pyles and McRae. They argue that the attorneys solely should be liable for the discovery expenses due to the plaintiffs' lack of legal skill and lack of daily contact with the litigation because of their widespread geographic locations. However, nothing in the record indicates that attorneys Pyles and McRae were acting outside the scope of the authority delegated to them by the plaintiffs. Therefore, we find no reason to except the plaintiffs from the general rule that a party is bound by the actions of his attorney. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 633–34, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962).

Finding no error below, the order of the district court is AFFIRMED.

14. Moreover, bad faith could be inferred under the circumstances of this case where appellees had a full 28 months in order to answer the interrogatories from the time they were served (March 1, 1977) to the time the motion to dismiss for failure to complete discovery was filed on July 5, 1979. *Cf. National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) (interrogatories remained unanswered for over 17 months despite numerous eleventh hour extensions).

Robert Wayne WILLIAMS,
Petitioner-Appellant,

v.

Frank C. BLACKBURN, Warden, Louisiana State Penitentiary, and William J. Guste, Attorney General of the State of Louisiana, Respondents-Appellees.

No. 81-3159.

United States Court of Appeals,
Fifth Circuit.
Unit A

June 18, 1981.

Petitioner appealed from an order of the United States District Court for the Middle District of Louisiana, Frank J. Polozola, J., which denied petition for habeas corpus relief. The Court of Appeals held that petitioner, who was sentenced to death

following first-degree murder conviction, was not entitled to habeas corpus relief on basis of action taken by either Louisiana state court or federal district court.

Affirmed.

1. Habeas Corpus ⇐105

Petitioner, who was sentenced to death following first-degree murder conviction, was not entitled to habeas corpus relief on basis of action taken by either Louisiana state court or federal district court.

2. Habeas Corpus ⇐90, 113(13)

Every assertion of ineffective assistance of counsel does not require a hearing; where district court has complete record before it, and particularly where it expressly states that a full and searching review was made, Court of Appeals is not required to remand so that district court would be compelled to go through motions of a hearing, unless it appears that additional evidentiary development is necessary on specific point.

Richard E. Shapiro, New Orleans, La., for petitioner-appellant.

Barbara B. Rutledge, Asst. Atty. Gen., New Orleans, La., John Sinquefield, Kay Kirkpatrick, Asst. Dist. Attys., Baton Rouge, La., for respondents-appellees.

Appeal from the United States District Court for the Middle District of Louisiana.

Before BROWN and GARZA, Circuit Judges, and BEER,* District Judge.

PER CURIAM:

On January 5, 1979, Petitioner Robert Wayne Williams participated in the robbery of a Baton Rouge, Louisiana, grocery store. During the robbery, Williams told the store security guard to give up his pistol. Before the guard did so, Williams shot him in the face at point-blank range with a sawed-off shotgun.

Petitioner was convicted of first-degree murder in Louisiana State District Court. In the penalty phase of his bifurcated trial, the jury recommended the penalty of death after finding the existence of three of the necessary aggravating factors listed by the Louisiana Code of Criminal Procedure, Article 905.4: (1) that the offender was engaged in armed robbery, (2) that he knowingly created a risk of death or great bodily harm to more than one person, and (3) that the offense was committed in an especially heinous, atrocious or cruel manner.

The conviction and sentence were affirmed by the Supreme Court of Louisiana. *State v. Williams*, 383 So.2d 369 (La.1980). Certiorari was denied. *Williams v. Louisiana*, —— U.S. ——, 101 S.Ct. 899, 66 L.Ed.2d 828 (1981). The state district judge signed a warrant ordering the imposition of sentence on March 31st. Williams sought habeas corpus in the state courts, but his petitions were denied. He filed this petition in the district court below on March 26th. The court requested and received the entire state trial record which it "carefully and personally read". The petition was denied on March 27th without hearing or oral argument, for the reasons set out in an opinion which is attached hereto as an appendix.

This court stayed Williams' execution on March 28th, and expedited consideration of his appeal. He raises a number of points, several of which allege error in the original trial, and several of which allege error in the manner whereby the federal district court considered and determined this matter. We find each point to be meritless, and, for the reasons stated below and those stated in the district court's opinion, we affirm.

[1] With regard to the state court, Williams asserts that (1) the exclusion of certain jurors at the voir dire phase violated the constitutional rule announced in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); (2) that there was in-

* District Judge for the Eastern District of Louisiana, sitting by designation.

sufficient evidence under the due process clause to support the second and third of the three aggravating circumstances found by the jury; (3) that he was deprived of the effective assistance of counsel at both the guilt and sentencing phases of his trial; and (4) that the Louisiana Supreme Court's system for comparative review of death sentences by judicial district rather than on a state-wide basis is unconstitutional in that it fails to ensure fair and evenhanded imposition. The district court expressly considered and rejected the first three of these claims. We find the reasons given in the court's opinion to be adequate and correct. As to the last point, on the Louisiana comparative review mechanism, we have heard nothing which would even hint at unconstitutionality, and wholly reject the argument.

[2] Williams argues that the federal court erred by (1) denying the ineffective assistance of counsel claims without affording an evidentiary hearing, (2) in applying the presumption of validity found in 28 U.S.C. § 2254(d) to legal conclusions rather than factual determinations, and (3) in failing to afford "independent consideration" to eight of Williams' constitutional claims. To begin, we note that every assertion of ineffective assistance does not require a hearing; where the district court had the complete record before it, and particularly where it expressly states that a full and searching review was made, we are not required to remand so that the district court would be compelled to go through the motions of a hearing, unless it appears to us that additional evidentiary development was necessary on a specific point. Here, we find nothing which would require a hearing, and hold the district court to have been correct in its rejection of the ineffective assistance points. We further hold that the district court did not err in its deference to legal conclusions made in state court; while a presumption of validity was not required by statute, the court was free to accept conclusions of law if it deemed them correct. Finally, we note that the district court's opinion reveals a careful and meticulous inquiry into the law and facts of this case, and reject any argument that certain of Williams' claims were disregarded.

Therefore, we affirm the judgment of the district court. The stay previously issued by this court will remain in effect until June 30th, expiring on that day. We further serve notice that no motion for rehearing will be entertained, and order the clerk to issue our mandate immediately.

AFFIRMED.

APPENDIX

SUPPLEMENTAL OPINION AND WRITTEN REASONS FOR JUDGMENT

Robert Wayne Williams was convicted of first degree murder and sentenced to death by a jury in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, Louisiana. His conviction and sentence were affirmed by the Louisiana Supreme Court. *State v. Williams*, 383 So.2d 369 (La.1980). Petitioner was granted a stay of execution pending his appeal to the United States Supreme Court. The United States Supreme Court denied petitioner's writ of certiorari, *Williams v. Louisiana*, — U.S. —, 101 S.Ct. 899, 66 L.Ed.2d 828 (1981), and his petition for rehearing. *Williams v. Louisiana*, — U.S. —, 101 S.Ct. 1493, 67 L.Ed.2d 622 (1981). Following the United States Supreme Court's refusal to hear petitioner's appeal, the state trial judge signed a warrant of execution ordering petitioner to be put to death on Tuesday, March 31, 1981, between the hours of 12:00 o'clock, midnight and 3:00 o'clock A.M. Thereafter, petitioner filed an application for a stay of execution and an application for a writ of habeas corpus in the Nineteenth Judicial District Court. For written reasons assigned on March 24, 1981, the state district court denied petitioner's application for a stay of execution and also denied petitioner's application for a writ of habeas corpus. The Louisiana Supreme Court denied petitioner's application for a stay of execution and review of application for post-conviction relief on March 26, 1981. Petitioner then filed suit in the United States District

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Court for the Middle District of Louisiana seeking a stay of execution and an application for writ of habeas corpus. Thus, petitioner has exhausted his available state court remedies.

Petitioner contends that his federally protected rights were violated in the following manner:

(1) Three prospective jurors were erroneously excused for cause in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

(2) Petitioner was deprived of the effective assistance of counsel at his sentencing hearing.

(3) Petitioner's death sentence violates the due process clause of the Fourteenth Amendment because there was insufficient evidence to support the jury's finding that (a) the offender knowingly created a risk of death or great bodily harm to more than one person: and (b) the offense was committed in an especially heinous, atrocious or cruel manner.

(4) The jury's finding that the offense was committed in an especially heinous, atrocious or cruel manner was in violation of the decision rendered in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

(5) The Louisiana Supreme Court violated petitioner's constitutional rights under the Eighth and Fourteenth Amendments when it only reviewed the evidentiary sufficiency of one of the three aggravating circumstances found by the jury.

(6) The trial court erred in failing to provide the jury with limiting instructions on the statutory aggravating circumstances.

(7) The Louisiana Supreme Court has adopted inconsistent standards of appellate review thereby increasing the likelihood of arbitrary and capricious sentencing in death cases.

(8) The Louisiana Supreme Court erred in reviewing other first degree murder cases only in the district in which the sentence was imposed rather than reviewing first degree murder cases on a statewide basis.

(9) The death sentence imposed upon petitioner was disproportionate and excessive under Louisiana law and the Eighth and Fourteenth Amendments to the Constitution of the United States.

(10) The trial court erroneously instructed the jury concerning the mitigating circumstances and the role of such circumstances in determining a death sentence.

(11) The Louisiana death penalty statute is unconstitutional under the Eighth and Fourteenth Amendments to the Constitution of the United States.

(12) The trial court erred in allowing the state to present evidence of an armed robbery at petitioner's trial on the charge of first degree murder.

(13) Petitioner was denied effective assistance of counsel when his attorneys failed to suppress a taped confession and other inculpatory statements.

There is no need for an evidentiary hearing in this case. The state court record is attached.

In reviewing a state prisoner's application for writ of habeas corpus, the federal court is bound by the provisions set forth in 28 U.S.C. § 2254(d) and the standards set forth in *Sumner v. Mata*, —— U.S. ——, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981); *LaVallee v. Delle Rose*, 410 U.S. 690, 93 S.Ct. 1203, 35 L.Ed.2d 637 (1973); *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Thus, in a federal habeas corpus proceeding instituted by a state prisoner, a determination after a hearing on the factual issues made by a state court of competent jurisdiction and evidenced by a written finding, written opinion or other reliable and adequate written indicia shall be presumed to be correct unless one of the seven specified conditions set forth in 28 U.S.C.

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§ 2254 is found to exist or unless the habeas corpus court concludes that the relevant state court determination is not fairly supported by the record. *Sumner v. Mata*, supra. Both the Louisiana Supreme Court and the state district court have made determinations of factual issues which have been reduced to writing in a written opinion. In the absence of the enumerated factors set forth in 28 U.S.C. § 2254, "the burden shall rest on the habeas petitioner, whose case by that time had run the entire gamut of a state judicial system, to establish 'by convincing evidence that the factual determination of the state court was erroneous.' 28 U.S.C. § 2254(d). Thus, Congress meant to insure that a state finding not be overturned merely on the basis of the usual 'preponderance of the evidence' standard in such a situation." *Sumner*, —— U.S. at ——, 101 S.Ct. at 771. Petitioner's assignment of errors which he alleges in his federal habeas corpus petition in paragraphs 3, 4, 6, 7, 9, 10, 11 and 12 were previously considered by the Louisiana Supreme Court on petitioner's direct appeal to that court. *State v. Williams*, supra. This Court hereby adopts the findings of fact and conclusions of law of the Louisiana Supreme Court as its own findings of fact and conclusions of law on these issues. *State v. Williams*, supra.

The state district court in the opinion it rendered on March 24, 1981, also considered the same thirteen issues which are raised in this suit. As noted earlier, the Louisiana Supreme Court refused to review the decision rendered by the state district court on petitioner's state court application for writ of habeas corpus.

The issues which the Louisiana Supreme Court did not discuss in its opinion rendered on petitioner's direct appeal will now be considered more fully by this Court. Petitioner first contends that three prospective jurors were erroneously excused for cause in violation of the dictates of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). Petitioner's claim is without merit. Furthermore, the arguments set forth in petitioner's memorandum on this issue are not complete. A careful review of pages 83, 84, 185 and 186 of the trial transcript which sets forth the voir dire examination of the three jurors in question clearly shows that the mandates set forth by the United States Supreme Court in the *Witherspoon* and *Adams* decisions were strictly adhered to and followed by the trial court.

Petitioner further contends that he was deprived of the effective assistance of counsel at his sentencing hearing and also was deprived of the effective assistance of counsel because his counsel failed to set forth a legal argument in the motion to suppress filed on behalf of the petitioner during the state court criminal proceedings. In setting forth his written reasons denying petitioner's application for writ of habeas corpus, the state trial judge stated:

> "Claim No. 2
>
> This is a claim stating that petitioner was deprived of the effective assistance of counsel at the sentencing phase of the trial. This judge was the trial judge in the case and was required, in the post-conviction report to the Louisiana Supreme Court, to discuss in detail the effective representation of counsel at the trial. The court was convinced after the trial and is still convinced that the petitioner did receive effective assistance by both counsel. The records and transcripts also convince the court of this fact. Therefore, the court is of the opinion that this item should be denied. • • •
>
> Claim No. 13 (this item is included in petitioner's amended petition)
>
> This again is an item dealing with effective assistance of counsel. This court is of the opinion that counsel in this case was competent, and filed all motions available to it. The transcript of the proceedings varified [sic] this."

This Court has also carefully reviewed the record to determine whether or not petitioner received the effective assistance of counsel during the course of the trial and also at the sentencing hearing. In reviewing the record to determine whether or not

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petitioner received effective assistance of counsel from his court appointed attorneys, the Court was guided by the standards set forth by the Fifth Circuit Court of Appeals in *MacKenna v. Ellis*, 280 F.2d 592 (5 Cir. 1960), modified 289 F.2d 928 (5 Cir. 1961), cert. denied, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961); *U. S. v. Gray*, 565 F.2d 881 (5 Cir. 1978), cert. denied, 435 U.S. 955, 98 S.Ct. 1587, 55 L.Ed.2d 807 (1978); *Herring v. Estelle*, 491 F.2d 125 (5 Cir. 1974). As set forth in the opinions of the Fifth Circuit Court of Appeals, effective counsel does not mean "errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *MacKenna v. Ellis*, supra, at 599. This necessarily "involves an inquiry into the actual performance of counsel in conducting the defense ... based on the totality of the circumstances and the entire record." *U. S. v. Gray*, 565 F.2d at 887. Although this Court believes that the findings of fact made by the state district court on the issue of effective assistance of counsel are correct, the Court has made a separate and independent review of the entire record and makes the following additional findings of fact. After entering a not guilty plea on behalf of the petitioner, petitioner's counsel filed a motion for a sanity commission hearing, a motion for discovery and inspection, and a motion to suppress evidence. A full and complete hearing was held on petitioner's motion to suppress certain confessions which were given by petitioner following his arrest. At the beginning of the trial, and prior to the time any testimony was taken, counsel filed a general objection to any evidence which pertained to the alleged armed robbery. Thereafter, counsel for petitioner made a very adequate and complete opening statement, made numerous objections to questions propounded by the district attorney during the course of the trial, and fully and adequately cross examined at least seven of the state's witnesses. In addition, the counsel for petitioner successfully objected to seven photographs which the state attempted to introduce which showed pictures of a badly mutilated body of the victim. In addition, counsel re-urged the objections made in the pre-trial motion to suppress the statements which the state attempted to introduce during the course of the trial. After the state rested its case, counsel called an expert on guns to support the petitioner's contention that the gun did not work properly and, therefore, petitioner did not have the specific intent to kill the victim. In addition thereto, counsel for petitioner called three neighbors and friends of the petitioner to set forth in the record the petitioner's very heavy dependency on drugs and was able to obtain a stipulation from the state regarding three additional witnesses whose testimony would have been cumulative on this same issue. Furthermore, counsel for petitioner obtained a stipulation from the state regarding testimony which Dr. Hypolite Landry would have given regarding the effect of the drugs on petitioner. Prior to the time the judge instructed the jury in this case, the petitioner requested the judge to give a jury instruction regarding intoxication. Following the jury's verdict in this case, counsel for petitioner again successfully objected to the very gruesome pictures of the victim's body which the state attempted to introduce at the sentencing hearing. Petitioner's counsel also called petitioner's mother who testified in detail regarding petitioner's background, good character, his church activities, and his involvement with drugs and the problems resulting from his drug usage. Counsel then made a very detailed and adequate closing argument to the jury at the sentencing hearing. A careful review of the total record in this case requires this Court to find, as the state district judge did, that petitioner received the effective assistance of counsel at all stages of his trial, including the sentencing hearing. The Court must further note that when this matter was appealed to the Louisiana Supreme Court on direct appeal, counsel for petitioner filed a very detailed brief regarding the sentence which was imposed on the petitioner in this case. In the federal application and also in the state application, the petitioner has now attached certain affidavits of witnesses which he contends his trial counsel erroneously failed to call at the trial

APPENDIX—Continued

of this case. However, a careful review of these affidavits reveals that these witnesses would not have added any new evidence to that which had already been presented at the sentencing hearing by petitioner's mother. These affidavits contain cumulative testimony which had previously been introduced during the trial and at the sentencing hearing. Also, the Court finds that the motion to suppress filed by the petitioner's counsel was a proper motion. The additional grounds now being urged by petitioner's counsel would not, in this Court's opinion, have affected the final conclusion rendered by the trial court and the Louisiana Supreme Court. *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1924); *United States v. Cortez, et al.*, —— U.S. ——, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). Finally, the Court must note what petitioner's trial counsel did following the verdict in this case. After the verdict was rendered herein, counsel for petitioner filed a motion for new trial and a motion and arrest of judgment. After these motions were denied, an appeal was filed with the Louisiana Supreme Court. This appeal was adequately and properly briefed by counsel for petitioner. Considering these additional factors, the Court, as indicated previously, finds the petitioner received reasonably effective assistance of counsel at all stages of these proceedings.

The final argument raised by petitioner is that the Louisiana Supreme Court erred when it failed to review only one of the three aggravating circumstances which the jury found to support its death penalty verdict. The Court agrees with the decision rendered by the Louisiana Supreme Court in *State v. Williams*, supra, that it was only necessary for that court to review only one of the three mitigating circumstances which the jury found since it is only necessary for the jury to find one aggravating circumstance to support the death penalty. However, out of an abundance of caution, this Court, has completely reviewed the record in this case and finds that all three aggravating circumstances found by the jury are fully, totally, and adequately supported by the evidence presented at the trial of this case. In other words, the Court finds that the state has proven beyond a reasonable doubt the evidence to support the three aggravating circumstances which the jury found in this case.

Finally, the Court must note that when petitioner filed an application for writ of certiorari with the United States Supreme Court, petitioner contended that his federally protected rights were violated in the following manner: "(1) the sentencing charge to the jury was unconstitutional because the instructions failed to provide clear and objective standards for the exercise of the jury's sentencing discretion; (2) petitioner was denied his constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution when the Supreme Court of Louisiana reviewed only one aggravating circumstance found by the jury to support its verdict of death; (3) petitioner's right to an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution was violated by the dismissal for cause of three jurors who never stated that they were irrevocably against imposing the death penalty." As noted earlier in this opinion, the United States Supreme Court refused to grant petitioner's application for writ of certiorari. *Williams v. Louisiana*, supra.

This Court realizes the seriousness of this case. For this reason this Court has made a very detailed and careful review and study of the entire record of this case, including the entire state court record. After so doing, this Court must and does conclude that it could find no error of any kind which would in any way cause this Court to stay the execution of petitioner which is set for March 31, 1981 or to grant petitioner an application for writ of habeas corpus. The Court also concludes that it would serve no useful purpose to delay these proceedings in order to conduct an evidentiary hearing into petitioner's complaints. The Court believes that no hearing is required to rule on the issues which petitioner has raised in his application. The Legislature for the State

APPENDIX—Continued

of Louisiana has, in its wisdom, decided to impose the death penalty as one sentencing alternative in first degree murder cases. The Legislature has provided a very detailed and constitutional procedure to be followed by the state court and the jury sitting in the state court before the jury can impose a death sentence. This procedure was carefully and meticulously followed in this case by the state trial judge and by the jury who heard the evidence in this case. Petitioner's case has now been reviewed by the state district court on motions for new trial and on post-conviction relief, by the Louisiana Supreme Court on direct appeal and on a petition for writ of certiorari for post-conviction relief, by the United States Supreme Court, and now by the United States District Court for the Middle District of Louisiana. This Court is totally and completely satisfied that petitioner has been accorded all of the constitutional rights which he is entitled to under our system of justice. Therefore, this Court shall not delay the execution which has been set for March 31, 1981, nor shall this Court grant to petitioner an application for writ of habeas corpus.

For reasons set forth above:

IT IS ORDERED that petitioner's application for stay of execution be and it is hereby DENIED.

IT IS FURTHER ORDERED that petitioner's application for writ of habeas corpus be and it is hereby DENIED.

Judgment shall be entered accordingly.

REPUBLIC OF TEXAS CORPORATION, Petitioner,

v.

BOARD OF GOVERNORS OF the FEDERAL RESERVE SYSTEM, Respondent.

No. 80-1985.

United States Court of Appeals, Fifth Circuit. Unit A

June 24, 1981.

Bank holding company petitioned for review of order of the Board of Governors of the Federal Reserve System denying its application for advance approval of its proposed acquisition of a commercial bank. The Court of Appeals, Randall, Circuit Judge, held that: (1) bank holding company's application could not be deemed to have been granted by operation of law, and (2) proceeding was remanded to the Board for further findings in light of fact that the Board, which had rejected the application on anticompetitive grounds, had failed to make adequate findings.

Ordered accordingly.

1. Banks and Banking ⇐525

The 91-day period within which an application for advance approval of a bank holding company's acquisition of a bank must be considered before the application is deemed to have been granted by operation of law does not begin to run immediately upon acceptance by local Federal Reserve bank of a completed application. Bank Holding Company Act of 1956, § 3(b) as amended 12 U.S.C.A. § 1842(b).

2. Banks and Banking ⇐525

Staff reports and recommendations of the Board of Governors of the Federal Reserve System are no part of the "complete record" within contemplation of statute providing that in the event of the failure of the Board to act on any application for approval of a bank holding company's ac-

APPENDIX D

Art. 905: Capital Cases; Sentencing Hearing Required.

Following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein.

Art. 905.1: Sentencing Hearing Jury; Commencement.

A. Except as provided in Part B herein, the sentencing hearing shall be conducted before the same jury that determined the issue of guilt. The order of sequestration shall remain in effect until the completion of the sentencing hearing.

B. If an error occurs only during the sentencing hearing which would necessitate the declaration of a mistrial, or the granting of a new trial by the trial court, or if an appellant (sic) court finds an error that occurred only in the sentencing hearing which would necessitate a remand and a new trial, then the trial court shall be empowered to empanel a new jury under the same procedure set out in Title XXVI, Chapter 3 of The Louisiana Code of Criminal Procedure for determining only the issue of penalty, and the rule of sequestration shall apply to the new jury so empanelled.

Art. 905.2: Sentencing Hearing; Procedure and Evidence.

The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

Art. 905.3: Sentence of Death; Jury Findings.

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances.

Art. 905.4: Aggravating Circumstances.

The following shall be considered aggravating circumstances:

(a) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery;

(b) The victim was a fireman or peace officer engaged in his lawful duties;

(c) The offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping;

(d) The offender knowingly created a risk of death or great bodily harm to more than one person;

(e) The offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) The offense was committed in an especially heinous, atrocious or cruel manner.

Art. 905.5: Mitigating Circumstances.

The following shall be considered mitigating circumstances:

(a) The offender has no significant prior history of criminal activity;

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(c) The offense was committed while the offender was under the influence or under the domination of another person;

(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) The youth of the offender at the time of the offense;

(g) The offender was a principal whose participation was relatively minor;

(h) Any other relevant mitigating circumstance.

Art. 905.6: Jury; Unanimous Recommendation.

A sentence of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Art. 905.7: Form of Recommendations.

The form of jury recommendation shall be as follows:

"Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

/s/ _____ FOREMAN"

or

"The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

/s/ _____ FOREMAN"

Art. 905.8: Imposition of Sentence.

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Art. 905.9: Review on Appeal.

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

APPENDIX E

LOUISIANA SUPREME COURT RULE 28

Rule 905.9.1 Capital sentence review (applicable to La.C.Cr.P. Art. 905.9)

Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Section 2. Transcript, Record. Whenever the death penalty is imposed a verbatim transcript of the sentencing hearing, along with the record required on appeal, if any, shall be transmitted to the court within the time and in the form, insofar as applicable, for transmitting the record for appeal.

Section 3. Uniform Capital Sentence Report; Sentence Investigation Report.

(a) Whenever the death penalty is imposed, the trial judge shall expeditiously complete and file in the record a Uniform Capital Sentence Report (see Appendix"B"). The trial court may call upon the district attorney, defense counsel and the department of probation and parole of the Department of Corrections to provide any information needed to complete the report.

(b) The trial judge shall cause a sentence investigation to be conducted and the report to be attached to the uniform capital sentence report. The investigation shall inquire into the defendant's prior delinquent and criminal activity, family situation and background, education, economic and employment status, and any other relevant matters concerning the defendant. This report shall be sealed, except as provided below.

(c) Defense counsel and the district attorney shall be furnished a copy of the completed Capital Sentence Report and of the sentence investigation report, and shall be afforded seven days to file a written opposition to their factual contents. If the opposition shows sufficient grounds, the court shall conduct a contradictory hearing to resolve any substantial factual issues raised by the reports. In all cases, the opposition, if any, shall be attached to the reports.

(d) The preparation and lodging of the record for appeal shall not be delayed pending completion of the Uniform Capital Sentence Report.

Section 4. Sentence Review Memoranda; Form; Time for Filing.

(a) In addition to the briefs required on the appeal of the guilt-determination trial, the district attorney and the defendant shall file sentence review memoranda addressed to the propriety of the sentence. The form shall conform, insofar as applicable, to that required for briefs.

(b) The district attorney shall file the memorandum on behalf of the state within the time provided for the defendant to file his brief on the appeal. The memorandum shall include:

i. a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant.

ii. a synopsis of the facts in the record concerning the crime and the defendant in the instant case,

iii. any other matter relating to the guidelines in Section 1.

(c) Defense counsel shall file a memorandum on behalf of the defendant within the time for the state to file its brief on the appeal. The memorandum shall address itself to the state's memorandum and any other matter relative to the guidelines of Section 1.

Section 5. Remand for Expansion of the Record. The court may remand the matter for the development of facts relating to whether the sentence is excessive.

STATE of Louisiana

v.

Robert Wayne WILLIAMS.

No. 65563.

Supreme Court of Louisiana.

April 7, 1980.

Rehearing Denied May 19, 1980.

Defendant was convicted by jury in Nineteenth Judicial District Court, Parish of East Baton Rouge, Frank Foil, J., of first-degree murder, arising out of grocery store robbery. Defendant was sentenced to death. Defendant appealed. The Supreme Court, Blanche, J., held that: (1) trial court did not abuse its discretion in denying defendant's challenge for cause of certain prospective juror; (2) evidence did not support defendant's claim that his confession was induced by his emotional disturbance over his wife's interrogation, but, rather, evidence supported trial court's ruling that defendant's confession was voluntarily given; (3) evidence of armed robbery was admissible as part of res gestae; (4) death penalty for murder is not per se unconstitutional; (5) statute governing capital cases gives jury acceptable constitutional standard with which to make determination that death penalty should be imposed; (6) evidence supported jury's conclusion that there was specific intent to kill or to inflict great bodily harm, which was essential element of first-degree murder; and (7) death sentence was not excessive.

Affirmed.

Dixon, C. J., concurred, but disagreed with proposition stated in Assignment No. 6.

Dennis, J., filed opinion in which he concurred in part and dissented in part and would grant a rehearing for reasons expressed in his dissent.

1. Criminal Law ⇐1152(2)
Jury ⇐85

In ruling on a party's challenge for cause of prospective juror, trial court is granted broad discretion, and its ruling will not be disturbed on appeal absent showing of abuse of that discretion.

2. Jury ⇐83(1)

In capital murder case, trial court did not abuse its discretion in denying defendant's challenge for cause of prospective juror, who was divorced with two children, ages 14 and 17, living at home, whose children attended school, and who had had small problems with younger child at school, even though defendant contended that juror was hardship case, because her testimony indicated that she was preoccupied with her children's welfare and, as result, could not devote her full attention to trial, as there was nothing in her testimony that indicated type of circumstances which would render sitting on sequestered jury particular hardship. LSA–C.Cr.P. art. 783.

3. Criminal Law ⇐519(1)

Question of voluntariness of confession, including determination of defendant's psychological state of mind, will be answered from facts and circumstances of each case.

4. Criminal Law ⇐1158(4)

The admissibility of confession is, in first instance, a question for trial judge, and his conclusions on credibility and weight of testimony will not be overturned on appeal unless they are not supported by evidence.

5. Criminal Law ⇐531(3)

In capital murder case arising out of grocery store robbery, evidence did not support defendant's claim that his confession was induced by his emotional disturbance over his wife's interrogation, but, rather, evidence supported trial court's ruling that defendant's confession was voluntarily given. LSA–R.S. 15:451.

6. Criminal Law ⇐365(1)

In capital murder case arising out of grocery store robbery, evidence of armed robbery was admissible as part of res ges-

tae, where there was no doubt that armed robbery was immediate concomitant of murder and formed, in conjunction with it, one continuous transaction. LSA–R.S. 15:448.

7. Criminal Law ⇐363

Evidence that forms part of res gestae is always admissible. LSA–R.S. 15:448.

8. Criminal Law ⇐1213

Death penalty for murder is not per se unconstitutional. LSA–Const. art. 1, § 20; U.S.C.A.Const. Amend. 8.

9. Criminal Law ⇐1206(1)

Statute governing capital cases gives jury acceptable constitutional standard with which to make determination that death penalty should be imposed. LSA–C.Cr.P. art. 905.

10. Criminal Law ⇐1159.2(2)

Louisiana Constitution limits Supreme Court's review of criminal convictions on appeal to questions of law, and thus only when there is no evidence of essential element of crime charged can Supreme Court's appellate jurisdiction be invoked to reverse conviction on evidentiary review. LSA–Const. art. 5, § 5(C).

11. Criminal Law ⇐312

Specific intent is a state of mind and as such, it need not be proven as a fact, but may be inferred from circumstances of transaction and actions of defendant. LSA–R.S. 14:10, 15:445.

12. Homicide ⇐230

In capital murder case arising out of grocery store robbery, evidence that defendant armed himself with sawed-off shotgun, that he and his partner entered store and proceeded immediately toward security guard, that his partner tried to disarm guard, that defendant, at guard's slightest movement, leveled shotgun within two feet of guard's face, screamed "Don't try it," and immediately shot guard's face off at point-blank range, was sufficient to support jury's conclusion that there was specific intent to kill or to inflict great bodily harm, which was essential element of crime of first-degree murder. LSA–R.S. 14:10, 14:30, 15:445.

13. Homicide ⇐354

Death sentence for first-degree murder arising out of grocery store robbery was not excessive, where Supreme Court's review of record did not reveal any factors which would indicate that sentence was imposed under influence of passion, prejudice or any other arbitrary factors, evidence supported jury's finding of statutory aggravating circumstance that store security guard was murdered in course of armed robbery, and Supreme Court was unable to conclude that sentence imposed was disproportionate to that imposed in similar cases. Supreme Court Rules, rule 28[905.9.1], 8 LSA–R.S.

14. Homicide ⇐354

In capital murder case arising out of grocery store robbery, jury having properly concluded that at least one statutory aggravating circumstance existed, i. e., that store security guard was murdered in course of armed robbery, it was within their power to return recommendation of death without finding other aggravating circumstances, and thus further inquiry as to whether certain other aggravating circumstances were properly found to exist was merely cumulative and unnecessary to support jury's verdict.

15. Criminal Law ⇐1206(2)

Arguable presence of mitigating circumstances, consisting of defendant's lack of significant prior criminal record and his drug-induced mental disturbance, did not necessarily render death sentence for first-degree murder arising out of grocery store robbery disproportionate.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Ossie B. Brown, Dist. Atty., John W. Sinquefield, Asst. Dist. Atty., for plaintiff-appellee.

Marion Weimer, Wyatt & Weimer, Stephen E. Covell, Covell & Covell, Baton Rouge, for defendant-appellant.

BLANCHE, Justice.*

The defendant, Robert Wayne Williams, was charged with first degree murder in violation of La.R.S. 14:30. He was found guilty and sentenced to death. On appeal, the defendant urges seven assignments of error.

During the trial, the state adduced the following facts: On January 5, 1979, the defendant and Ralph Holmes entered the A & P Supermarket located at 3525 Perkins Road in Baton Rouge. Both men placed ski masks over their faces and Williams pulled out a 12-gauge sawed-off shotgun. They then approached the security guard, Willie Kelly, age 67, who was bagging groceries. Ralph Holmes tried to remove Kelly's pistol from his holster. As Kelly made a move with his hand toward his pistol, Williams yelled "Don't try it", and immediately shot Kelly in the face at point blank range. Williams and Holmes then proceeded to complete the robbery. During this process, Holmes pistol-whipped one of the customers, and Williams accidentally shot two people in their feet. The police received a telephone call from an informant implicating Holmes, Williams and Williams' wife. Following their arrest, both Williams and his wife gave confessions which implicated themselves in the crime.

Assignment of Error Number 1

[1, 2] By this assignment, the defendant contends that the trial court erred in denying the defendant's challenge for cause of the prospective juror Gladys Almand. The defendant argues that Mrs. Almand was a hardship case and should have been excluded from the jury. The voir dire examination revealed that Mrs. Almand was divorced with two children, ages 14 and 17, living at home. Both children attended school and Mrs. Almand indicated that she had had small problems with the younger child at school. The defendant argues that the testimony of Mrs. Almand indicated that she was preoccupied with her children's welfare and, as a result, could not devote her full attention to the trial. La.C.Cr.P. art. 783 provides in part as follows:

> "B. If jury service, whether criminal or civil, would result in undue hardship or extreme inconvenience, the district court may excuse a person from such service either prior to or after his selection for the general venire, jury pool, or jury wheel. The court may take such action on its own initiative or on recommendation of an official or employee designated by the court."

In ruling on such challenges, the trial court is granted broad discretion, and its ruling will not be disturbed on appeal absent a showing of an abuse of that discretion. See *State v. Drew*, 360 So.2d 500 (La.1978); *State v. Monroe*, 366 So.2d 1345 (La.1978). In the instant case, a review of the record of the voir dire examination does not show an abuse of that discretion. Although Mrs. Almand did have two teenaged children, nothing in her testimony indicated the type of circumstances which would render sitting on a sequestered jury a particular hardship.

For these reasons, the assignment is without merit.

Assignments of Error Numbers 4 and 5

By these assignments, the defendant argues that the trial court erred in failing to suppress his confession, and in allowing the introduction of the taped confession and signed waiver of rights form at trial.

[3, 4] The defendant asserts that his confession was not freely and voluntarily given. He does not claim that any overt or physical coercion or intimidation was involved; rather, he maintains that the confession was obtained in a psychologically coercive atmosphere. The defendant claims that the police officers intentionally left the door open to his wife's interrogation room so that he could hear their questioning of her while he waited in the next room. Thus, he maintains that he was psychologi-

* Chief Judge PAUL B. LANDRY, Jr., retired, participated in this decision as Associate Justice Ad Hoc.

cally coerced into confessing because he could hear his wife crying.

La.R.S. 15:451 provides as follows:

"Before what purposes [purports] to be a confession can be introduced in evidence, it must be affirmatively shown that it was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises."

The question of voluntariness of a confession, including a determination of the defendant's psychological state of mind, will be answered from the facts and circumstances of each case. *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). Thus, the admissibility of a confession is, in the first instance, a question for the trial judge. His conclusions on the credibility and weight of the testimony will not be overturned on appeal unless they are not supported by the evidence. *State v. Gaines*, 354 So.2d 548 (La.1978).

[5] Although the defendant claims that his confession was induced by his emotional disturbance over his wife's interrogation, the evidence does not support such a conclusion. The evidence reveals that the defendant and his wife were arrested at 10:30 a. m., at which time he was read his *Miranda* rights. Subsequently, the defendant gave a taped confession between 4:30 and 7:30. The defendant testified that he was upset during his interrogation, but there is no other indication that his emotional distress was so severe that he was unable to voluntarily give a statement. The police officers testified that the door to the interrogation room of defendant's wife was closed, and that it was unlikely that the defendant heard much of what went on. Further, it should be noted that the defendant's confession was essentially exculpatory in nature since he claimed that the shotgun went off accidentally.

For these reasons, we conclude that the trial court's ruling as to the voluntariness of the confession was supported by the evidence. The assignments are without merit.

Assignment of Error Number 3

In this assignment, defendant contends that the trial judge erred in allowing the introduction of evidence of the armed robbery. The defendant argues that, as he was charged with first degree murder, the evidence of the armed robbery served no probative purpose and was extremely prejudicial since first degree murder requires proof of specific intent to kill or cause great bodily harm, and proof of the armed robbery does not contribute to the proof of specific intent.

[6, 7] We find that the evidence was admissible as part of the res gestae. La. R.S. 15:448 provides:

"To constitute res gestae the circumstances and declarations must be necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it one continuous transaction."

Thus, evidence that forms part of the res gestae is always admissible. Here, there is no doubt that the armed robbery was an immediate concomitant of the murder and formed, in conjunction with it, one continuous transaction. See *State v. Matthews*, 354 So.2d 552 (La.1978); *State v. Williams*, 375 So.2d 364 (La.1979); *State v. Donahue*, 355 So.2d 247 (La.1978).

For these reasons, we find the assignment is without merit.

Assignment of Error Number 8

[8] By this assignment, the defendant contends that the trial court erred in imposing the death sentence. He argues that the imposition of the death penalty violates both the eighth amendment to the United States Constitution and art. 1, § 20 of the Louisiana Constitution.

The United States Supreme Court has indicated that the death sentence, when imposed on a subject convicted of murder, is not necessarily unconstitutional. See *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428

U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). Similarly, this Court has recognized in *State v. Myles* (La.1979) (No. 63,567) (rehearing granted), that art. 1, § 20 does not prohibit the imposition of the death penalty in appropriate cases.

For these reasons, we conclude that the defendant's argument that the death penalty is, per se, unconstitutional is without merit.

Assignment of Error Number 7

[9] The defendant claims that the court erred in denying his motion in arrest of judgment. The defendant maintains that La.C.Cr.P. art. 905 is unconstitutional in that it does not give the jury an acceptable constitutional standard with which to make the determination that the death penalty should be imposed.

Our capital sentence law, following the decision in *Roberts v. La.*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), was modeled upon the Georgia statute which was upheld by the U.S. Supreme Court in *Gregg v. Georgia*, supra. In *State v. Martin*, 376 So.2d 300 (La.1979), we found that our present sentencing scheme does provide adequate safeguards against the arbitrary imposition of the death penalty.

For these reasons, we find the defendant's assignment without merit.

Assignment of Error Number 6

By this assignment, the defendant argues that the trial court erred in denying his motion for a new trial. The defendant maintains that a new trial should have been granted because the state failed to prove an essential element of the crime, i. e. specific intent to kill or to inflict great bodily harm.

[10] The Louisiana Constitution limits this Court's review of criminal convictions on appeal to questions of law. La.Const. art. 5, § 5(C). Thus, only when there is no evidence of an essential element of the crime charged can this Court's appellate jurisdiction be invoked to reverse a conviction on an evidentiary review. *State v. Valentine*, 364 So.2d 595 (La.1978); *State v. Tucker*, 354 So.2d 521 (La.1978); *State v. Main Motors, Inc.*, 383 So.2d 327 (La.1979).

La.R.S. 14:10 defines specific intent as follows:

"(1) Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act."

La.R.S. 15:445 provides in part as follows:

"In order to show intent, evidence is admissible of similar acts, independent of the act charged as a crime in the indictment, for though intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction."

[11] Specific intent is a state of mind and as such, it need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of the defendant. Thus, charging the victim in a threatening manner and trying to get at him with a knife over a bar as been found to be evidence of specific intent to kill. *State v. Garner*, 241 La. 275, 128 So.2d 655 (1961). Likewise, the pointing of a gun at the victim as it was fired has been ruled evidence of a specific intent to kill. *State v. Procell*, 365 So.2d 484 (La.1978).

[12] The defendant herein armed himself with a sawed-off shotgun. He and his partner entered the A & P Supermarket and proceeded immediately toward Willie Kelly. His partner tried to disarm Kelly. At Kelly's slightest movement, the defendant levelled the sawed-off shotgun within two feet of the victim's face, screamed "Don't try it", and immediately shot Kelly's face off at point blank range.

We find that there is ample evidence in the record to support the jury's conclusion that there was specific intent to kill or to inflict great bodily harm.** For these reasons, the assignment is without merit.

** This factual finding supports defendant's conviction irrespective of the standard of review.

Sentence Review

[13] Rule 905.9.1 requires a mandatory review by this Court of any case wherein the death penalty was imposed to determine whether it was excessive. The rule sets forth three criteria of review as follows:

> "*Section 1. Review Guidelines.* Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine: (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Our review of the entire record does not reveal any factors which would indicate that sentence was imposed under the influence of passion, prejudice or any other arbitrary factors.

The jury found the following three aggravating circumstances:

> "(a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery; . . . (d) the offender knowingly created a risk of death or great bodily harm to more than one person; . . . (g) the offense was committed in an especially heinous, atrocious, or cruel manner; . . ."

The evidence clearly supports the conclusion that the victim was murdered in the course of an armed robbery. The state witnesses' testimony is unrefuted that the two assailants removed money from the store's cash registers and safe while holding various people at gunpoint.

See *Jackson v. Virginia*, 439 U.S. 1064, 99 S.Ct. 828, 59 L.Ed.2d 29 (1979).

[14] The jury having properly concluded that at least one statutory aggravating circumstance existed, it was within their power to return a recommendation of death without finding other aggravating circumstances. Thus, further inquiry as to whether these other aggravating circumstances were properly found to exist is merely cumulative and unnecessary to support the jury's verdict.

[15] In accordance with Rule 905.9.1, § 3, the trial court completed a Uniform Capital Sentence Report. We have reviewed this report in conjunction with the post-sentencing report. The defendant is a 27-year-old black male, married with one infant daughter. The evidence at trial shows that his wife drove the getaway car and her uncle, Ralph Holmes, was the defendant's other accomplice. The defendant completed school through the tenth grade and psychiatric evaluation revealed that the defendant could distinguish between right and wrong and showed no behavioral disorders.[1] The defendant does not have a significant prior criminal record.[2] The defendant claims that he has been injecting preludin for six years and committed the robbery in order to obtain drugs. At the sentencing hearing, the defendant argued three statutory mitigating circumstances.

The defendant argues that his lack of a significant prior criminal record and his drug-induced mental disturbance were significant mitigating circumstances which required the imposition of a life sentence. We have previously affirmed death sentences imposed despite the absence of any significant prior criminal record. See *State v. Williams* (La.1980) (No. 64,987); *State v. Martin*, 376 So.2d 300 (La.1979). Further, this Court has affirmed a sentence of death where the defendant argued voluntary intoxication as a mitigating

1. In his sentence report, the trial judge noted that at the time of the defendant's indictment, he outwardly exhibited possible mental problems. Both doctors suspected the defendant was faking mental illness, especially since his behavior was normal when he was not being observed. After the sanity hearing, the defendant did not again raise the issue of sanity.

2. The defendant was previously convicted of resisting arrest and of misdemeanor theft.

circumstance. *State v. Prejean*, 379 So.2d 240 (La.1979). Thus, we find that the arguable presence of these mitigating circumstances does not necessarily render this sentence disproportionate.

In conformity with § 4(b), the district attorney has compiled a sentence memoranda which contains a synopsis of each first degree murder case in the district since January 1, 1976.

The sentence review memoranda shows that there have been 28 murder prosecutions in East Baton Rouge Parish with eleven resulting in first degree murder convictions. Of these eleven, only three of the defendants were sentenced to death. These three cases are strikingly similar in that all three defendants were the actual killers and the crimes all arose during the perpetration of armed robberies. See *State v. Williams*, 383 So.2d 369 (La.1980) (No. 65,563); *State v. Clark*, No. 66,573, appeal pending.[3]

Thus, a review of the sentences imposed in the same parish shows that in the cases most similar to the defendant's, the death penalty was imposed. Our review also shows a dissimilarity between the defendant's case and the other first degree murder convictions in that arguably, there are no aggravating circumstances[4] or there were present mitigating circumstances which justified the jury's recommendation of life imprisonment.[5]

In light of the above considerations, we are unable to conclude that the sentence imposed here is disproportionate to that imposed in similar cases.

For the above assigned reasons, the sentence and conviction of the defendant are affirmed.

AFFIRMED.

DIXON, C. J., concurs, disagreeing with propositions stated in Assignment # 6.

DENNIS, J., concurs in part and dissents in part for reasons to be assigned.

DENNIS, Justice, concurring in part and dissenting in part.

I concur in the majority's affirmance of the defendant's conviction, but I respectfully dissent from its refusal to set aside the death penalty and order a new capital sentence hearing. The jury found three aggravating circumstances, namely, that the murder occurred during the commission of an armed robbery, that the defendant knowingly created a risk of death or great bodily harm to more than one person, and that the murder was committed in an especially heinous, atrocious or cruel manner. See La.C.C.P. art. 905.4(a)(d) and (g). The record will not support beyond a reasonable doubt the findings that the defendant knowingly risked the lives of more than one person, nor that the murder was especially heinous. Our constitutional mandate to review death sentences with the utmost care requires that we remand this case for a new sentencing hearing to permit the jury to make its grave decision without consideration of erroneous and prejudicial findings of aggravating circumstances. I cannot say beyond a reasonable doubt that the jury, told that it may not consider this murder especially heinous or that it may not find that more than one life was knowingly risked, would persist in its recommendation of death.

Because of the qualitative difference between the death penalty and all others under the criminal law, a correspondingly greater need for reliability exists in the determination that a defendant must die

3. Although both Michael Glover and Ralph Holmes, Jr. were convicted of first degree murder, they were not sentenced to death. However, both participated as principals, as distinguished from being the actual perpetrator, in the respective crimes committed with Colin Clark and Robert Williams.

4. *State v. Collins*, 378 So.2d 928 (La.1980); *State v. Allen*, 380 So.2d 28 (La.1980); *State v. Foote*, 379 So.2d 1058 (La.1980); *State v. Spooner*, 368 So.2d 1086 (La.1979).

5. *State v. Edwards*, 375 So.2d 1363 (La.1979); *State v. Howard*, 377 So.2d 1226 (La.1980); *State v. Glover*, 381 So.2d 832 (La.1980); *State v. Holmes*, No. 65,846 (appeal pending).

for his crimes. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

The Due Process Clause and Article 1, § 2 of the Louisiana Constitution protect every accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Searle*, 339 So.2d 1194 (La.1976). In view of our duty to ensure a greater degree of reliability when the death sentence is imposed, it is clear that a jury finding of an aggravating circumstance, as a matter of constitutional and statutory law, see La.C.Cr.P. art. 905.3, must be founded at least upon proof beyond a reasonable doubt. *Lockett v. Ohio, supra.* The critical inquiry of this Court in its review of a capital sentence must be whether the evidence in the record can reasonably support a finding of an aggravating circumstance beyond a reasonable doubt. *Jackson v. Virginia, supra.* Any error in the jury's finding of aggravating circumstances must be scrutinized according to whether such error introduced an element of arbitrariness and capriciousness into the jury recommendation of death, which renders the death sentence constitutionally impermissible. See *Lockett v. Ohio, supra; Gardner v. Florida, supra; Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *State v. English*, 367 So.2d 815 (La.1979); *State v. Sonnier*, 379 So.2d 1336, 1371 (La. 1979) (separate opinion). We cannot approve a death penalty in the face of an error in the capital sentencing hearing unless we are convinced beyond a reasonable doubt that the mistake was harmless to the jury's recommendation. See *Lockett v. Ohio, supra; Gardner v. Florida, supra; Proffitt v. Florida, supra;* see also, *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710 (1967).

The jury here clearly erred in finding that the murder was especially heinous and that the defendant knowingly created a risk of death or great bodily harm to more than one person. The proper standard for a finding of an especially cruel or heinous murder incorporates the notion that the murder must have been inflicted through torture or pitiless infliction of unnecessary pain on the victim. *State v. English, supra*, at 823. Such a limitation protects the statute defining this aggravating circumstance from constitutional attacks for overbreadth and vagueness. See *Proffitt v. Florida, supra.* Here, the victim was shot almost immediately after the defendant raised his gun; he died instantly. The defendant did not torture or inflict unnecessary pain upon the security guard. The jury's finding of this aggravating circumstance cannot be supported by the record beyond a reasonable doubt.

As to the jury finding that the defendant knowingly created a risk of death or great bodily harm to more than one person, our analysis must focus on whether the defendant *contemplated* and *caused* the knowing creation of great risk of death or great bodily harm to more than one person. See *State v. English, supra*, 367 So.2d at 824; see also *Proffitt v. Florida, supra.* The defendant shot the security guard at point-blank range, and although customers stood nearby, there is no evidence that a danger existed to these other patrons. In fact, they apparently were further removed from the victim than Ralph Holmes, the defendant's cohort, who was unstrapping the guard's pistol at the time of the shooting. It is clear that the defendant intended to kill only the guard and, considering the point-blank range, it cannot be found beyond a reasonable doubt that the offender knowingly created a risk of death or great bodily harm to more than one person. Unless this statutory aggravating circumstance is strictly construed, the statute is subject to arbitrary interpretations inconsistent with the constitution. *State v. English, supra; Proffitt v. Florida, supra.*

The majority errs in basing its opinion on the premise that the death penalty must be upheld if the jury correctly finds "one or more" aggravating circumstances to exist. Apparently the majority sees the role of this Court in capital sentence review as a

limited one of determining if there is at least one correctly found aggravating circumstance. This view is clearly in conflict with the Supreme Court's decisions in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) and *Jackson v. Virginia, supra*, and with our constitutional duties, Article 1, § 20 of the Louisiana Constitution, and our statutory responsibilities, La.C.Cr.P. art. 905, et seq. Under these principles, this Court is charged with reviewing the jury's recommendation to determine if the sentence was influenced by passion, prejudice or any arbitrary factor. The presence of two erroneous findings of aggravating circumstances, especially since these factors relate to cruelty and the creation of a risk of death to more than one person, clearly introduces room for a jury to act through passion, prejudice, or arbitrariness.

I respectfully submit that, in order to impose a constitutional death sentence, this case should be remanded for a new sentencing hearing. In the proceeding on remand the jury should be permitted to weigh the single aggravating circumstance of which there was a reasonable evidentiary basis, i. e., the offender's engagement in armed robbery, against the mitigating circumstances, e. g., Williams' lack of a serious criminal record and his drug addiction, in determining whether the death sentence is appropriate in this case.

Bertha HICKERSON

v.

PROTECTIVE NATIONAL INSURANCE COMPANY OF OMAHA.

Nos. 66118, 66132.

Supreme Court of Louisiana.

April 7, 1980.

Rehearing Denied May 19, 1980.

Plaintiff, who was injured in collision involving her car and another automobile, brought action to recover under uninsured motorist coverage of policy insuring her car. Insurer brought third-party complaint to recover on theory of subrogation against owner and driver of the automobile. The Twenty-Fourth Judicial District Court, Parish of Jefferson, Floyd W. Newlin, J., entered judgment for plaintiff in main action and for third-party defendants in third-party action, and insurer appealed. The Court of Appeal, Fourth Circuit, Schott, J., 375 So.2d 969, affirmed plaintiff's judgment, determined that trial court had properly denied insurer a judgment against state Insurance Guaranty Association, and reversed in part so as to give insurer judgment against driver and owner of automobile. After writs of review were granted, the Supreme Court, Watson, J., held that: (1) "nonduplication" provision within Insurance Guaranty Association law is intended to apply to ordinary insurance coverage and not to uninsured motorist coverage; (2) Association was to be deemed an insurer with all obligations of insolvent insurer of automobile involved in collision with plaintiff's car, and, to extent of that coverage, owner and driver of automobile were insured; (3) such automobile was not "uninsured" within meaning of certain statute, and, thus, since policy limits were sufficient to cover plaintiff's damages, awarding plaintiff judgment against her uninsured motorist carrier was error; and (4) Association was not entitled to a judgment for reimbursement against owner and driver of automobile.

Reversed and rendered.

1. Insurance ⇐8

Purpose of "Nonduplication" provision within Insurance Guaranty Association law is to prevent double recovery. LSA-R.S. 22:1386(1).

2. Insurance ⇐8

"Nonduplication" provision within Insurance Guaranty Association law is intend-